

THE UNIVERSITY OF CHICAGO

THE POINT OF EQUAL ACCESS TO JUSTICE:
ON THE DUTY TO, AT TIMES AND PROVISIONALLY, PAUSE, COOL DOWN
AND LISTEN

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE LAW SCHOOL
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF JURISPRUDENCE

BY
MARCO SEGATTI

CHICAGO, ILLINOIS

MARCH 2019

TABLE OF CONTENTS

ABSTRACT, *vi*

INTRODUCTION, *I*

PART I. DOMAIN: CONCEPTUAL, EMPIRICAL AND HISTORICAL EXPLORATIONS OF ACCESS TO JUSTICE

OVERVIEW, *II*

CHAPTER 1. IS THERE A (HUMAN) RIGHT OF ACCESS TO JUSTICE?, *19*

1. Introduction, *19*; 2. One pattern, three areas of concern, and social duties of assistance (and their restriction), *22*; 3. Four challenges to human rights, *26*; 3.1. Access to *what?*, *29*; 3.2. The four challenges reconsidered, *32*; 4. The plan ahead, *37*.

CHAPTER 2. EQUAL ACCESS TO JUSTICE: THREE INTERPRETATIONS, *40*

1. Introduction; *40* 2. Access to *what?* A reprise, *41*: 1) The idea of equal protection of the law, *46*; 2) Equal standing in open court, *52*; 3) The idea of human agency in legal affairs, *61*; 3. The three interpretations in practical argumentation: two illustrations, *67*.

CHAPTER 3. DUTIES OF ASSISTANCE AND THE CRIMINAL/CIVIL DISTINCTION, *69*

1. Introduction, *69*; 2. On qualifying the practical relevance of the distinction between criminal and civil cases in equal access to justice: The perils of being right for the wrong reasons, *70*; 3. The point of a categorical right to counsel for the criminal defendant, *74*; 4. How much is enough? When the right reasons for distinguishing are also good reasons for blurring the distinction itself, *83*; 5. A brief restatement and a summary, *87*;

CHAPTER 4. THE RIGHT OF SELF REPRESENTATION: UNFETTERED DISCRETION AND ACCESS TO JUSTICE, *94*

1. Introduction, *94*; 2. Self-representation and access to justice in the common law: the criminal defendant, *95*; 3. ...and the civil plaintiff, *98*.

CHAPTER 5. ON THE MARKET MECHANISM AND EQUAL ACCESS TO JUSTICE, *100*

1. Introduction, *100*; 2. Economic and social development: the point of distinguishing, *105*; 2.1. Economic development and crime prevention, *109*; 2.2. Economic development and propensity to sue, *112*; 3. Markets as idealized conditions of exchange and production, and markets as a set of institutions: on the analytical priority of access to justice, *115*;

CHAPTER 6. EQUAL ACCESS TO JUSTICE AND THE MARKET FOR LAWYERS: COMPETITION AS AN INCENTIVE TO COMPLY, *120*

1. Introduction, *120*; 2. A static interpretation of the market for lawyers, *123*; 3. The dynamic effects of markets, *125*; 3.1. Efficient compliance and deterrence, *126*; 3.2. Patrolling the frontier, *128*; 3.3. A tentative equilibrium, *131*; 4. The virtues of the commercialization of law, *131*; 4.1. Commerce against servile dependency, *134*; 5. Conclusion, *140*.

CHAPTER 7. EQUAL ACCESS TO JUSTICE AND THE MARKET FOR LAWYERS: THREE FAILURES, *142*

1. Introduction: The market for lawyers and perfect competition, *142*; 2. Spillovers in the market for lawyers, *145*; 3. Uncertainties about law, *149*; 4. Fragmentation and specialization in the market: the gulf between corporate and individual clients, *151*; 5. Conclusion, *153*.

CHAPTER 8. THE NEED FOR A THEORETICAL BASE: FOUR ARGUMENTS, *159*

1. Introduction, *159*; 2. One introductory argument on the point of equal access to justice, *161*; 3. Three further arguments on equal access to justice: limits and insights, *164*; 4. Conclusion, *171*.

CHAPTER 9. UNMET LEGAL NEEDS: IDENTIFICATION AND RICH DESCRIPTIONS, *174*

1. Introduction, *174* 2. Empirical studies of access to justice and their evaluative limitations, *176*;
3. Beyond litigation rates: unmet legal needs, *177*; 4. Why capabilities?, *179*.

PART II NORMATIVE FOUNDATIONS

OVERVIEW, *184*

CHAPTER 10. WHY CAPABILITIES? ON THE DUTY TO, AT TIMES AND PROVISIONALLY, PAUSE, COOL DOWN,
AND LISTEN, 188

1. Process based or outcome based aspects of freedom: on some practical damages of a classic theoretical distinction, 188; 2. Sen's motivating concerns with distinguishing between process and opportunity aspects of freedom, 191; 3. Nussbaum to the rescue: on the human animal condition, lists and the duty to pause, cool down and listen, 194; 4. Equality in the space of capabilities, 201; 5. The good that we seek: capabilities or functionings?, 206; 6. A human right, a social duty, or a capability? A reprise, 210; 6.1. The content of the duty: 'at times', 'provisionally', 'pause', 'cool down', and 'listen', 211; 6.2. A social duty, or a human right?, 217.

CHAPTER 11. THE INSTRUMENTALITIES OF ACCESS TO JUSTICE IN DEFENDING DEMOCRATIC VALUES OF
COOPERATION, 223

1. Access to justice and social justice, 223; 2. The epistemic value of access to justice, 232; 3. The expressive value of access to justice, 235; 4. A brief summary – and an anticipation of the work ahead, 237.

PART III. PRACTICAL APPLICATIONS. TESTING THE POLITICAL PRINCIPLES OF EQUAL ACCESS TO JUSTICE
OVERVIEW, 239

CHAPTER 12. FREE LEGAL COUNSEL AND ACCESS TO JUSTICE, 244

1. Introduction: The Uncertain Paths of Constitutionalization: the Right to Legal Aid in The U.S.; and Europe, 244; 2. Legal aid in the US Supreme Court: Gideon and beyond, 245; 3. From retaining one's lawyer to access to justice: from formal opportunities to capabilities, 249; 4. The dubious grounds of a utilitarian calculus in allocating access to justice, 256; 5. The protection of civil legal aid in the European Convention of Human Rights, 260; 6. Fertile functionings and Corrosive Disadvantages in Access to justice, 269; 7. Capabilities or functionings? A reprise, 277;

8. On modeling the delivery of legal aid: institutional limits and political challenges, 280; 9. A tentative evaluative synthesis, 292.

CHAPTER 13. IS GROUP LITIGATION LEGITIMATE?, 294

1. Introduction, 294; 2. The theoretical and practical challenges in contemporary class action law and practice, 302; 3. External v. internal views of the class; process based v. outcome based approaches to procedural legitimacy; judicial doctrines on the legality of group litigation, 309; 4. The right to a day in court argument. Its structure, content, practical consequences and limits, 314; 5. An alternative argument: the interpretation of the principles of equal access to justice in group litigation, 319; 5.1 On how to justify group litigation, 320; 5.2. Mandatory classes, opt-in or opt-out aggregation mechanisms, 328.

CHAPTER 14. STILL AGAINST SETTLEMENT?, 336

1. Introduction, 336; 2. A summary of Levmore and Fagan's analysis of confidential settlements, 342; 3. A restatement of Levmore and Fagan's analysis: effective legal protection, equal standing and party autonomy, 345; 4. Levmore and Fagan after Fiss: Five arguments against settlement, 348; 5. Legitimacy and publicity in judicial administration: The epistemic and expressive value of public trials, 359;

CHAPTER 15. ON PRACTICAL ATTITUDES WITHIN THE LITIGATION PROCESS; AND THEIR POLITICAL RELEVANCE, 370

Introduction, 370; 1. Frank M. Johnson's judicial career, 376; 1.1. Johnson's docket, 378; 2. The Selma march and Bloody Sunday, 380; 3. The point of at times and provisionally, pause, cool down and listen in political activism, 385; 4. Conclusion, 394.

CONCLUSION, 396

BIBLIOGRAPHY, 407

ABSTRACT

What is the source of Governments' commitments in the administration of justice? Why, and when, should Governments pay for private lawyers? Should actual users of legal services be asked to pay for (at least some of) these costs? How should we identify the *relevant* costs anyways?

Does the protection of equality matter for how we answer these questions? If so, which conception of equality is best suited for understanding its claims in the administration of justice? Which kinds of limits should Governments be authorized to impose on the use of legal services, in order to protect their *equal* availability?

These are (some of) the central normative questions in the field of access to justice. Their respective answers directly affect the way we should think about many pressing and urgent political questions.

This essay argues that the comparative best way to think about these questions is to begin by identifying our moral, pre-political interest, which we all share as humans, in protecting the abilities (or behavioral functions) involved in access to justice. *Given* the kind of beings that we are (responsive to reasons of various kinds, sociable, and having needy and temporal bodies), we are morally interested in our ability to disagree with others in certain qualified ways. This moral interest is what triggers the recognition of a (moral) duty to, at times, and provisionally, pause, cool down, and listen.

We ought to demand that Governments pay for the administration of justice, and even pay (at times at least) for private lawyers, because we recognize as morally binding, for ourselves and for others, the reasonable authority of the duty on our activities and interests.

Furthermore, we understand that the ideal of equality exert claims on the administration of justice because we understand that the *actual* power to make others pause, cool down and listen, *without* having to offer good reasons for it, is precisely what marks authoritarian and hierarchical relations.

Governments ought to step up and decidedly intervene in the administration of justice then. But *how* should we structure their interventions?

This essay proposes three principles, which should help one to think well about public intervention the field. We should model public institutions in access to justice as a means to protect people from hierarchical social relations, as a means to protect the epistemic capacities of public institutions, and as a means to express a democratic culture in dispute resolution.

Finally, this essays tries to show the relevance and reach of these principles for political analysis, by discussing four controversial subject matters in the field. In particular, this essay argues that Governments are under a duty to provide legal aid in an ample class of cases, and then critically comments on different institutional strategies to do that. It argues that we should distinguish between individual and social patterns of wrongdoing, before authorizing the institutional enforcement of confidential settlements. The essay supports the introduction of forms of group litigation; and it advises us, also, that whenever we (as members of a political community) have to decide on how to structure our investments in institutional reform, we should allocate resources in political or legal activism, depending on their *combined* effects in pushing people to comply with their duty to pause, cool down and listen.

INTRODUCTION

What is the source of Governments' commitments in the administration of justice? Why, and when, should Governments pay for private lawyers? Should actual users of legal services be asked to pay for (at least some of) the costs of administering justice? How should we identify the *relevant* costs anyways?

Does the protection of equality matter for how we answer these questions? If so, which conception of equality is best suited for understanding its claims in the administration of justice? Which kinds of limits should Governments be authorized to impose on the use of legal services, in order to protect their *equal* availability?

These are (some of) the central normative questions in the field of access to justice. Their respective answers directly affect the way we should think about many pressing and urgent political questions. For example, in the contemporary world at least, Governments typically invest large sums of money paying for prosecutors in criminal cases, and, under specified conditions, for private lawyers for the accused. Is it reasonable that Governments typically don't do this across all legal cases and subject matters? More generally, do Governments have an obligation to pay for legal aid? Under which conditions, and depending on whose consent, should laws authorize the aggregation of claims through group litigation? Is the institutional enforcement of confidential settlements a legitimate practice? How should we think about the respective pay-offs of political and legal activism, whenever we pursue reform strategies of entrenched social practices?

Practical concerns with equality in access to justice have a long and respectable pedigree, and a fairly intuitive appeal. For example, in his famous polemic with Judge Arshhurst in *Truth v. Arshhurst* or *Law as it is*, Jeremy Bentham, after quoting Arshhurst's emphatic statement that, for the common law of the day, "No man [was] so low as not to be within the protection of the law", caustically replied:

Ninety-nine men out of a hundred are thus low. Every man is, who has not from five-and-twenty pounds, to five-and-twenty times five-and-twenty pounds, to sport with, in order to take his chance for justice. [...]. Five-and-twenty pounds, at the same time, is more than three times what authors reckon a man's income at in this country, old and young, male and female, rich and poor, taken together: and this is the game a man has to play again and again, as often as he is involved in a dispute, or receives an injury.¹

Similarly, in the *Constitutional Code*, Bentham argued that

In all hitherto established systems of Judicial warfare, – partly through negligence, partly by design, the relatively helpless have in the lump been left without defence [...]; although in relation to Judicature, to leave a man without defence, is on the part of government to deny him justice. [...] Here then is injustice, – injustice in the shape of sinister partiality, – established by express law: – established upon an all-comprehensive scale: injustice to the many, to and for the benefit of the few.²

As a pioneering utilitarian, Bentham quickly concluded that the only sensible way of governing a system of procedural rules should consist in the relentless application of the principle of utility in all circumstances.³ Neither Bentham's more general programmatic statements, nor his rhetorical skills, should obfuscate his diagnostic brilliance or the contemporary relevance of many of his proposals for creative institutional reforms. For one thing, notice how he grounds his rebuttal: being within 'the protection of the law' has

¹ Jeremy Bentham, *Truth versus Ashhurst; or, Law As It Is, Contrasted with What It Is Said to Be*, in THE WORKS OF JEREMY BENTHAM, published under the superintendence of his executor, John Bowring, vol. V, (1843), p. 233

² Jeremy Bentham, *Constitutional Code*, in THE WORKS OF JEREMY BENTHAM, published under the superintendence of his executor, John Bowring, vol. IX, (1843), p. 493

³ It should be noted that Bentham most probably had reliable sources of information regarding the cost of legal services ('from five- and-twenty pounds, to five-and-twenty times five-and-twenty pounds'), given his notes and studies of the details of judicial administration in England as well as elsewhere, but it is not entirely clear how he came up with the 99% estimation, nor whether the total sum of everyone's 'utility' could be actually improved by increasing the number of people that are not 'so low as to not be within the protection of the law'.

a ‘price’; thus, merely looking at what laws formally promise, without looking, also, at one’s ability to pay such price, blinds us about the ways in which laws actually distribute rights and duties, benefits and costs across the population.

More concretely, Bentham was among the first to propose a government-financed system of legal aid – that he called *Equal Justice Fund*. His plan was, basically, to raise money by taxing wealthier parties, in order to then finance the poor, paying for their lawyers.⁴

Since Bentham’s times, the political concerns about the demands of equality in access to justice have significantly grown and received world-wide institutional recognitions. For example, article 47 of the *Charter of Fundamental Rights of the European Union* recognizes to everyone the right to an effective remedy and a fair trial, for all violations of the rights and freedoms guaranteed by the Union. Crucially, such right includes both a right to “a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law” (art. 47,2) as well as (art. 47,3) a right to *legal aid*, which shall be made “available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

Similarly, art. 39(A) of the Constitution of India (aptly titled, “Equal Justice and Free Legal Aid”), explicitly states that “The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”.

⁴ For a detailed discussion of Bentham’s plans, see JUDITH RESNIK, DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011), at 371, 376 – 377.

Even countries, like the United States of America, whose courts have often struggled in systematizing their commitment to equal access to justice for all, have a long and significant history (as reflected, in the case of the United States, for example, in the constitutions of many states), of doctrinal development and explicit recognition of at least a number of foundational (even if partial) aspects of equal access to justice.⁵

Active engagement in the field of access to justice has not been limited to the narrow domains of legislative or judicial reforms, however. Professional organizations, not-for-profit organizations and today NGOs, have increasingly joined in the struggle for realizing the promise of equal justice for all. For example, at the end of the 19th century in Europe, the first recognitions of the desperate demands of newly emerging legal needs (strongly connected with the great transformations of economic and social relations brought about by industrialization) came from religious groups, workers' association, political parties and other charitable institutions.

Notwithstanding such long history of institutional reforms, political agitation, and academic engagement (and notwithstanding the urgency of the underlying demands) the theme of access to justice has received sporadic attention by political philosophers and legal theorists. So, the first aim of this paper is to call philosophers' attention to an urgent political issue, and that requires reasoned engagement and systematic analysis.

⁵ For example, art. 1, sec. 12 of the Indiana Constitution of 1851 states that "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay", available here: <http://www.in.gov/history/2870.htm>. See also, in a very similar tone, art. 11 in part I of the 1780 Massachusetts Constitution, which states that "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws", available here <http://www.nhinet.org/ccs/docs/ma-1780.htm>.

The comparative best way to think about the point of equal access to justice, this essay argues, is to begin by identifying our moral, pre-political interest, which we all share as humans, in protecting the abilities (or behavioral functions) involved in access to justice. *Given* the kind of beings that we are (responsive to reasons of various kinds, sociable, and having needy and temporal bodies), we are morally interested in our ability to disagree with others in qualified ways. This moral interest is what triggers the recognition of the duty to, at times, and provisionally, pause, cool down, and listen.

Furthermore, this essay argues that the recognition of the duty depends upon the identification of a list of central capabilities, and qualifies our interpretation of all of the latter. We recognize the authority of the duty *because* we want to protect these central capabilities, *and* we cannot say that one's capabilities are effectively protected and nurtured unless one can confidently trust others to comply with their duty to pause, cool down and listen.

I call this a *duty*, in order to signal that the good, which the duty protects, exert claims on us only “through considerations which reflection brings upon”, and on “projection of remote considerations”. In order for it to effectively assert its authority, that is, we should be ready to forego more attractive, or more immediate and vividly appealing, interests.

I say that its recognition is a moral, pre-political interest, which we all share as humans, in order to signal that we are interested in its compliance, and we (morally) ought to respect its obligations, even *before* we enter in any specific political community.

We ought to demand for Governments' intervention in the administration of justice, and even (at times at least) for private lawyers then, because we recognize as

morally binding, for ourselves and for others, the reasonable authority of the duty on our activities and interests.

Furthermore, we understand that the ideal of equality exert claims on the administration of justice because we understand that the *actual* power to make others pause, cool down and listen, *without* having to offer good reasons for it, is precisely what marks authoritarian and hierarchical relations. Such unrestricted power might infect the enjoyment of all of our central capabilities, and prejudice the full development of our ability to disagree with others in qualified ways.

In a democratic community, permanent as well as non-permanent members are entitled to invoke the formal machinery of justice, mobilize their formal rights and make claims on others on the basis of their equality with others – *not* on the basis of their superiority (threatening others to comply by leveraging the superior means at their disposal), or on the basis of their inferiority (conditioning the realization of their justified claims to the benevolence of others).⁶ Equal access to justice, on this reading, guarantees that the grounds of social criticism specified by laws are available to all – *and* that they are so in virtue of everyone's equality. I take this claim to have two broad implications, which I elaborate in the following: first, that we should choose *capabilities* as the most perspicuous informational focus for evaluating access to justice; and second, that we should choose *which* capabilities in access to justice to support (and *how much* to do so),

⁶ I take this formulation from Elizabeth Anderson, *What is the Point of Equality?*, in 109 ETHICS 287 (1999), at p. 289 (and supporting the choice of capabilities as the appropriate space for evaluating social disadvantages, at pp. 316 ff.); see also MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1991), for a very similar argument in the context of claiming the protection of disability rights and DAVID ENGEL, FRANK MUNGER, RIGHTS OF INCLUSION (2003), see esp. pp. 78, 88, 89 for a nuanced discussion of the broad relevance of taking one or another of these different attitudes toward the actual realization of one's rights for her chances to activate their formal protection.

in light of both their constitutive as well as instrumental role in protecting and guaranteeing equal standing and respect in social relations more generally.

Governments ought to step up and decidedly intervene in the administration of justice then. But *how* should we structure their interventions? Put differently, how should we specify the *political* content of the duty to pause, cool down and listen, in a way, which is relevant for political engagement and institutional reform?

This essay proposes three principles, which, I argue, should help one to think well about public intervention in the field. We should model institutions in access to justice as a means to protect people from hierarchical social relations, as a means to protect the epistemic capacities of public institutions, and as a means to express a democratic culture in dispute resolution.

I understand these principles as tools for political analysis – that is, their point is to direct our attention, whenever we evaluate the desirability of reforms in access to justice, on our expectations that such reforms will effectively improve the material and institutional conditions under which access to justice can be used by the relevant actors as a means to protect people from hierarchical social relations, as a means to protect the epistemic capacities of public institutions, and as a means to express a democratic culture in dispute resolution.

Finally, this essays tries to show the relevance and reach of these principles for political analysis, by discussing four controversial subject matters in the field. In particular, the application of these political principles tell us that Governments are under a duty to provide legal aid in an ample class of cases, and it enables one to critically comment on different institutional strategies to do that. It advises us to distinguish

between individual and social patterns of wrongdoing, before authorizing the institutional enforcement of confidential settlements. It supports the introduction of forms of group litigation; and it advises us, also, that whenever we (as members of a political community) have to decide on how to structure our investments in institutional reform, we should allocate resources in political or legal activism, depending on their combined effects in pushing people to comply with their duty to pause, cool down and listen.

At base then, this paper argues that a capabilities approach⁷ (CA, for short), and the ideal of equality in social relations jointly provide the comparatively best framework for both normative evaluation and empirical identification of the relevant social phenomena.

This essay has fifteen chapters, organized in three parts.

Part I identifies a list of desiderata for any reasonable theory of equal access to justice. The section begins with an overview of human rights law in the field of access to justice (Chapter 1). Then, it analyzes three common interpretations of equal access to justice (Chapter 2) and illustrates their uses in two practical questions (Chapters 3 and 4). Chapters 5, 6 and 7 study the relation between the market mechanism and the protection of equal access to justice. Chapter 8 begins the work of testing historical arguments on the value of equal access to justice against the *desiderata* for any theory of equal access to justice identified in the first 7 chapters, whereas chapter 9 begins to introduce the

⁷ See A. SEN, *Equality of What?*, in MCMURRIN (ED.), TANNER LECTURES ON HUMAN VALUES, Vol. 1 (1980); A. SEN & M. NUSSBAUM, *THE QUALITY OF LIFE* (1993); SEN, *THE IDEA OF JUSTICE* (2009), at 225 – 317; Id., *Elements of a Theory of Human Rights*, in 32 *PHILOSOPHY AND PUBLIC AFFAIRS* 315 (2004); Id., *COMMODITIES AND CAPABILITIES* (1985); NUSSBAUM, *CREATING CAPABILITIES, THE HUMAN DEVELOPMENT APPROACH*, (2013); NUSSBAUM, *Capabilities, Entitlements, Rights: Supplementation and Critique*, 12 *JOURNAL OF HUMAN DEVELOPMENT AND CAPABILITIES* 23 (2011); Id., *Constitutions and capabilities: "Perception" against Lofty Formalism*, 121 *HARVARD LAW REVIEW* 4 (2007); Id., *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2005); Id., *The costs of tragedy: some moral limits of cost-benefit analysis*, in 29 *J. LEGAL STUDIES* 1005 (2000); Id., *Capabilities and Human Rights*, in 66 *FORDHAM LAW REVIEW* 273 (1999).

vocabulary of a Capabilities Approach (CA) and discusses the first, most basic, contribution of a CA to the access to justice scholar.

Part II formulates a theoretical hypothesis on the normative foundations of equal access to justice, by identifying the specific human function, which grounds a pre-political moral interest in it. Also, Part II elaborates the three political principles, which give reasonable specifications of such pre-political moral interest, and guide practical thought in the field. Chapter 10 introduces the argument by elaborating on Nussbaum's evaluative description of the human animal condition and shows how the recognition of the duty to, at times and provisionally, pause, cool down and listen is implicated by the latter. Chapter 11 proposes the three principles, which, I argue, give specific political content to the duty to cool down, pause and listen.

Part III contains several practical tests for the theoretical hypothesis on the normative foundation proposed in Part II, as it critically reviews several contemporary political discussions in the field: the allocation of the right to counsel and the provision of legal aid (chapter 12); the legitimacy of group litigation (chapter 13); the permissibility of confidential settlements (chapter 14); and the use of legal activism within larger strategies of social and political reform (chapter 15). At base, then, Part III carries the most significant argumentative weight for the interpretation of equal access to justice, which this essay proposes. If the reader agrees with my political reconstructions of current practical matters, then he or she can reasonable trust that the political principles which I propose will guide her or him well in thinking through other practical problems in the field. Vice versa, if the reader doesn't agree with me, then one possible explanation (if this essay has done its job well), is that he or she disagrees with my interpretation of the

point of equal access to justice, and, thus, he or she doesn't agree that access to justice should be thought of as a means to protect social equality, nurture the epistemic powers of public institutions and express a democratic culture in dispute resolution.

PART I

DOMAIN: CONCEPTUAL, EMPIRICAL AND HISTORICAL EXPLORATIONS OF ACCESS TO JUSTICE

OVERVIEW

The aim of this section is to identify the *desiderata* for a reasonable theory of equal access to justice – what is it that we should ask from a theory of equal access to justice, in order to confidently trust its justification, and practical understanding of a Government’s commitments in the administration of justice?

A reasonable theory of equal access to justice, I argue, should be able to:

1) Evaluate how procedural devices are linked to the kinds of substantive outcomes that we should aim for; that is, our theory of access to justice should be tied up with a more general theory of social justice;

2) Consistently integrate the thought that people have justified claims to *both* specific prohibitions against interfering state action, as well as to affirmative institutional and material support, and it needs to offer guidance on how to accommodate these two sets of claims in consistent ways;

3) Provide an interpretation, and keep a running account of the respective benefits and costs of different avenues and forms of contestation and claim making, within and beyond formal litigation, and integrate recognized entitlements within a systematic understanding of personal duties and responsibilities;

4) Evaluate forms of agencies and meaningful participation in the legal process, even in cases in which the relevant being does *not* control all the relevant procedural levers;

5) Provide an account of the formation, and exercise, of cognitive and practical skills about the law, and their impact on the protection of relevant goods;

6) Provide an account of equality, which doesn't use wealth (and wealth only) as a proxy for advantage and disadvantage;

7) Provide a sufficientarian understanding of public commitments in access to justice, that could allow one to say, 'Governments are under a duty to provide to all potential parties to legal proceedings a threshold level of actual opportunities to litigate, and litigate effectively, their claims. We should determine such level by considering, also, the probable consequences of granting such level to all potential parties to legal proceedings. Beyond such level, Governments are under no obligation to protect or support people's actual opportunities to litigate their claims and they should organize legal institutions and proceedings as to assure that no one is authorized to waste public resources in frivolous claims'.

This section is divided in 9 chapters.

Chapter 1 begins with a brief overview of human rights law in access to justice. I identify a pattern (access rights are typically understood as a specification of a right to 'equality before the law'), three dimensions of evaluative concern (remedial efficacy, procedural safeguards, and agency in legal affairs) and specific duties of assistance (positive obligations, which Governments are under an obligation to fulfill) in access to justice.

Then, the chapter considers four current challenges to the use of human right language and discourse in political justification and show their direct relevance in the field of access to justice.

Human rights have been often charged of being ambiguous about whether the underlying entitlements, which they purportedly justify, should be thought of as prohibitions against state interference, or rather as affirmative tasks for institutional and material support, or both.

Furthermore, human rights are frequently thought of as entitlements, which pertain to humans especially and, indeed, the existing body of human rights law generally understands humans as their sole (or prime) beneficiaries. The recognition of human animals as the beneficiaries of these rights constituted a giant step for our received political commitments, as it extended the attribution of rights beyond national boundaries first, and then beyond rationality, or full cognitive development. But is humanity then the *only* possible basis for the recognition of these rights?

Rights-talk itself has been charged with neglecting duties and personal responsibilities, and thus as being ultimately harmful for the production of disagreements based on reciprocal reason-giving, while all too prone to produce disruptive conflicts of oppositional assertiveness.

Human rights law, finally, has been suspected of being disingenuous and naïve about the empirical links between ‘rule-change’ and ‘behavioral (or ‘social’) change’.

Neither one of these challenges, this chapter argues, should advise us to dismiss talk of access-rights altogether. Rather, this chapter argues that they point us to where political talk of access rights requires serious scrutiny and further supplementation.

Chapter 2 analyzes three interpretations of what it is that people claim, when they claim equal access to justice for all. I then make educated conjectures on the practical implications of grounding one's commitment to equal access to justice on either one of such interpretations.

Claims about access to justice are often understood, first, as claims to a particular correspondence between the 'rules as announced' and the 'rules as applied'. This is the interpretation of equal access to justice, which revolves around the ideal of 'equal legal protection'. What we want, when we demand access to justice interpreted in this way, is a particular kind of outcome for legal procedures.

A second interpretation of equal access to justice revolves around the ideal of 'equal standing in open court'. Claims about access to justice are understood here as claims to a particular status, a set of recognized powers and formal capacities, which grants one with opportunities for formal claim-making in a court of law. What we want, when we demand access to justice interpreted in this way, is a particular kind of process, which is designed for adjudicating substantive claims.

A third interpretation of equal access to justice revolves around the ideal of 'agency in legal affairs'. Claims about access to justice are understood in this case, as claims about one's capacity to use laws to achieve goals one has reason to value. What we want, when we demand access to justice interpreted in this way, is respect for, and protection of, one's competency to use substantive entitlements, against interference by third parties and the State.

Chapters 3 and 4 analyze the possible uses of these interpretations within two classic debates in the field of access to justice: the evaluation of the practical relevance of

a categorical distinction between criminal and civil cases for the recognition of a right to counsel; and the evaluation of the desirability of recognizing a right to self-representation in judicial proceedings. These chapters conclude that we shouldn't trust either one of the received interpretations of equal access to justice to provide conclusive guidance in practical matters in the field of access to justice: each of the received interpretations misses important features of the relevant legal and social phenomena we should be ready to evaluate and, thus, requires extensive integration and qualifications by a richer set of conceptual resources.

Chapters 5, 6 and 7 study the relation between the market mechanism and the protection of equal access to justice.

On the one hand, chapter 5 analyzes the role, which markets in general can play, for the protection of one interpretation or the other (as defined in the second chapter) of equal access to justice. On the other, chapters 6 and 7 focus on one specific market in access to justice (the market for lawyers) and analyzes the possible evaluative contributions of the norm of perfect competition in appraising its role for the protection of equal access to justice.

Chapter 5 discusses two well known, and widely accepted, distinctions: the distinction between economic and social development and the distinction between markets understood as a set of ideal conditions jointly defining the norm of perfect competition, and markets understood as a set of institutional and behavioral requirements. Then, the chapter shows the relevance of these distinctions for the access to justice scholar. The access to justice scholar is well advised to keep these distinctions (or sensible reformulations of these distinctions, depending on one's intellectual tastes) in

mind, because they should help her to reasonably study, for example, the relevance of economic opportunity-costs in crime reduction and prevention, and in driving down litigiousity and in generally affecting the social determinants of people's propensity to use.

Chapter 6 then moves to a discussion of the possible uses and reach of the norm of perfect competition in the evaluation of the market for lawyers, and its contributions in the protection of equal access to justice. The chapter explores three arguments on the *dynamic* effects of the markets for lawyers for the protection of equal access to justice. The first two assume that the market for lawyers can operate close to the norm of perfect competition, whereas the third does not: Market for lawyers might play an important role in easing the pains of the moral choice of complying with the law, especially for the relatively wealthier; patrolling the expansion of the social costs of litigation; steering people away from cooperation in claim-making, based on servile dependency, toward cooperation based on mutual self-interest.

Then, chapter 7 attempts to probe the conditions under which we can safely assume that actual markets for lawyers can effectively operate reasonably close to the norm of perfect competition, and expresses skepticism on the abilities of public intervention to squeeze any particular market for lawyers so that the price of lawyers could safely approach marginal cost.

Chapter 8 begins the work of testing historical arguments on the value of equal access to justice against the *desiderata* for any theory of equal access to justice identified in the first 7 chapters.

The chapter studies four arguments in particular. First, the value of equal access to justice, this chapter argues, could be understood as an implication of the ideal of

government by consent. If a necessary condition for the legitimacy of a legal order is tied to the kind of consent, which it receives from its subjects, then systematic asymmetries in the application of laws, which are not *explicitly* contemplated by the valid legal material in the relevant jurisdiction, could be seen as a violation of the requirement of consent. Unequal access to justice amounts to a *fraud*, perpetrated by a Government, for the benefit of some its citizens, to the exclusion of all others.

Second, the value of equal access to justice could be understood as an idealization of adversary proceedings in adjudication, as the best (or standard) method for dispute resolution. Having equal access to justice means that one has acquired a particular social *status* in claim-making under the law, and that one has been granted the institutional capacity to *stand* against one's adversaries, in front of an audience of one's peers.

Third, equal access to justice could be understood as a welfare-right – that is, as an entitlement on claim-making under the law, which should complement broader institutional transformations in the mechanisms of resource-distribution in a given society, and which is itself designed to protect or maintain fair patterns of resource-distribution.

Fourth, the value of equal access to justice could be understood as implicated by the ideal of the rule of law. That is, equal access to justice could be seen as an essential component of what it means, for Governments, to generally abide to the principles of the rule of law.

Each of the received arguments provides important insights on how to understand the value of equal access to justice. Also, each of the argument makes abundant use of, and explains or refines, one or more of the interpretations of equal access to justice,

identified in chapter 2. And yet each of them fails because neither one can provide a coherent and systematic understanding of all three of such clusters of concepts.

Chapter 9 begins to introduce the vocabulary of a Capabilities Approach (CA). The chapter discusses the first, most basic, contribution of a CA to the access to justice scholar. A CA is useful in the field of access to justice, the chapter argues, because it offers a pertinent and refined vocabulary, which can be used for rich descriptions of the relevant social phenomena.

The argument is framed by showing, first, the limitations of existing empirical approaches in providing one with the relevant pieces of information for evaluating a jurisdiction's successes, or failures, in protecting equality in access to justice. The chapter discusses, in particular, 'litigation-rates' studies, the gradual evolution of researches on so-called 'unmet legal needs', and 'transformation-studies' in dispute-processing. Then, the chapter introduces a suitably general definition of CA, as a way of integrating the insights of previous approaches, and overcoming their limitations. This is not *just* a terminological quarrel: a CA's vocabulary (and, in particular, its distinction between capabilities and functionings, and its distinction between basic, internal, and combined capabilities) helps the access to justice scholar to identify the most relevant 'informational-focus' on access to justice; and then express the underlying evaluative choices called upon by such identification in a clear and explicit way.

1. IS THERE A (HUMAN) RIGHT OF ACCESS TO JUSTICE?

1. Introduction

Perhaps the first and most immediate candidate for expressing evaluative concerns in the field of access to justice is human rights language and discourse. We could easily express the thought that Governments have weighty and urgent commitments in the administration of justice, if we could say, first, that people have a pre-political entitlement to be treated in specific ways whenever they try and press their claims to public officials and authorities, or generally proceed to use laws and regulations to manage their business.¹

As we shall see in this chapter, all the so-called core human rights treaties do recognize a set of central access rights. Moreover, the recognition of this set of access rights seems to follow a pattern, and to engage a list of clearly identifiable areas of practical concern, in consistent ways. It should be very tempting then to try and consolidate a further step, and find further unity in this plurality, by formulating a single and unified account of a general right of access to justice.

This chapter argues that we should resist this temptation, and refrain from talking about one (human) ‘right of access to justice’. What we need, instead, is to find ways of

¹ In fact, as we will see in Part II, the approach, which this essay proposes, shall look very similar indeed to this basic understanding. With one crucial difference, which is meant to address the challenges to human rights law discussed in this chapter: instead of grounding Governments’ commitments in access to justice (and in the protection of *equal* access to justice in particular) on a pre-political entitlement (like a human right), it will try and ground these commitments on a pre-political social *duty* (the duty to, at times and provisionally, pause, cool down and listen). On this reading, Governments have weighty commitments in equal access to justice because people themselves have a duty to, at times and provisionally, pause, cool down and listen.

supplementing and critiquing the current political use of the access rights we already have.²

In order to fix ideas and have a sharper focus on the relevant phenomena, the chapter begins with a brief overview of human rights law in access to justice. I identify a pattern (access rights are often understood as a form of protection of ‘equality before the law’), three dimensions of evaluative concern (remedial efficacy, procedural safeguards, and agency in legal affairs) and specific duties of assistance (positive obligations, which Governments are under an obligation to fulfill) in access to justice.

Then, the chapter considers four current challenges to the use of human right language and discourse in political justification and show their direct relevance in the field of access to justice.

Human rights have been often charged with being ambiguous about whether the underlying entitlements, which they purportedly justify, should be thought of as prohibitions against state interference, or rather as affirmative tasks for institutional and material support, or both.³

Furthermore, human rights are frequently thought of as entitlements, which pertain to humans especially and, indeed, the existing body of human rights law generally understands humans as their sole (or prime) beneficiaries. The recognition of human animals as the beneficiaries of these rights constituted a giant step for our received

² These are (clarification, supplementation and critique), in fact, the functions, which the Capabilities Approach (the CA) can and should play within human rights discourse, according to Nussbaum. See, especially, Nussbaum, M., *Capabilities and Human Rights*, 66 FORDHAM LAW REVIEW 289 (1997) and Nussbaum, M., *Capabilities, Entitlements, Rights: Supplementation and Critique*, 12 JOURNAL OF HUMAN DEVELOPMENT AND CAPABILITIES 23 (2011); see also the introduction of the same issue by Polly Vizard, Sakiko Fukuda-Parr and Diane Elson.

³ For an account of the transformations and evolutions of human rights discourse, once it integrated an articulation of the principle of positive obligation, see FREDMAN, SANDRA, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* (2008).

international commitments, as it extended the attribution of rights beyond national boundaries first, and then beyond rationality, or full cognitive development.⁴ But is humanity then the *only* possible basis for the recognition of these rights?

Rights talk itself has been charged with neglecting duties and personal responsibilities, and thus as being ultimately harmful for the production of disagreements based on reciprocal reason-giving, while all too prone to produce disruptive conflicts of oppositional assertiveness.⁵

Human rights law, finally, has been suspected of being disingenuous and naïve about the empirical links between ‘rule-change’ and ‘behavioral (or ‘social’) change’.⁶

Neither one of these challenges, this chapter argues, should advise us to dismiss talk of access-rights altogether. Rather, they point us to where political talk of access rights requires serious scrutiny and further supplementation.

First, political talk on access rights needs to consistently integrate the thought that people have justified claims to *both* specific prohibitions against interfering state action, as well as to affirmative institutional and material support, and it needs to offer guidance on how to accommodate these two sets of claims in consistent ways.

Second, political theorizations about equal access to justice must keep a running account of the respective benefits and costs of different avenues and forms of contestation and claim making, within and beyond formal litigation, and integrate

⁴ For a philosophical account of how “the doctrine of human rights [became] the articulation in the public morality of world politics of the idea that each person is a subject of global concern”, see BEITZ, CHARLES, *THE IDEA OF HUMAN RIGHTS* (2009).

⁵ For the classic articulation of this criticism, see GLENDON, MARY ANN, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

⁶ See POSNER, ERIC, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014).

recognized entitlements within a systematic understanding of personal duties and responsibilities.

Finally, they should not pre-empt serious discussion on the extension (or restriction) of substantive entitlements to beings which are *not* human persons, but rather remain adequately responsive to changes in substantive laws and regulations.

2. One pattern, three areas of concern, and social duties of assistance (and their restriction)

Even a quick glance at the treatment of access to justice by core human rights treaties (especially when they are read in conjunction with the *Universal Declaration of Human Rights*) shows a pattern, three clearly identifiable areas of concern, several public duties of assistance, and a common logic for restricting the recognition of latter.

Access rights typically constitute a specification of public commitments to the protection of ‘equality before the law’. Furthermore, access-rights typically insist on three areas of practical concern: 1) A significant sample of them consists in rights to *effective remedies*; 2) Another significant sample contain a set of *procedural safeguards* (which entrust one with formal powers to meaningfully participate in legal proceedings) and 3) a final sample accord protections to one’s *agency in legal affairs*. Access rights often prescribe specific *duties of assistance*, which are typically heavier in the case of, and give special priority to, criminal proceedings and defendants in particular. Crucially, human rights law doesn’t understand access-rights as conditioned on membership of a

specific national community, nor does it condition their recognition on the possession of rationality or full, adult, cognitive development.

The *Universal Declaration of Human Rights* (UDHR) contains the most basic human rights framework in access to justice, and one, which has found its way in all other core human rights treaties. The pattern begins with article 6 of the UDHR, which recognizes a “right to recognition everywhere as a person before the law”. Article 7 contains the prescription that “All are equal before the law and are entitled without any discrimination to equal protection of the law”. Article 8 then recognizes “a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”. And article 10 finally recognizes to everyone (“in full equality” to everyone else) an entitlement “to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

So access rights are an interpretation and specification of an entitlement to the equal protection of the law, without any discrimination (article 7). They include a right to *remedial effectiveness* (art. 8) and a right to certain *procedural safeguards* (art. 10). Somewhat more hidden (but it will appear in a clearer way in later documents) there is, also, a right to specific *forms of agencies* in legal affairs. (This is one way of understanding Article 6, which recognizes an entitlement to be recognized as persons before the law. We are entitled to such recognition because we are entitled to act in the legal world, in ways that are recognized as meaningful – depending on the kind of agency we are recognized as possessing, or which forms of agency any legal community wishes

to protect *in law*, we are thus entitled to sign contracts, to own or sell property, to sue someone or be sued, to stand as witness, or as a jury member and so on).

All the nine, subsequent, core human rights treaties have followed suit, and contain specific provisions, which are meant to consolidate and specify these commitments, in each of their respective areas of concern and practical engagement.

Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), commits State Parties to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”.

Then, the same article 5 moves on to recognize a “right to equal treatment before the tribunals and all other organs administering justice” (Art. 5, a), and again a (albeit narrow) right to remedial efficacy, guaranteeing “security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution” (Art. 5, b).

Similarly, Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) begins by stating that “All persons shall be equal before the courts and tribunals”, and then spells out in great detail a long list of procedural safeguards (part 1, and 3(d)).

Article 2, part 3 of the ICCPR contains the standard ‘remedial efficacy’ clause. The document adds specific duties of assistance (art. 14 part 3 (d) and (f)), but, following a long tradition of interpretation, it then limits the recognition of the correlative human rights (for example, the right to have the assistance of counsel, regardless of one’s ability to pay for it) to defendants in criminal trials only.

Article 15, part 2 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) adds several novel provisions, as it obliges State Parties to (Part 2) “accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals” and (Part 3) to declare null and void “all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women”. This is the clearest formulation of human rights law commitment to the protection of specific forms of agency in the legal world. It is a humanitarian imperative to accord to women the legal capacity to conclude contracts, and to administer property, and equal treatment in the management of disputes, in a way, which shall be *identical* to that of men, with the same opportunities to exercise that capacity. People generally thus have a pre-political entitlement of being recognized as meaningful agents in the legal world, and a pre-political entitlement to treatment as equally meaningful agents.

The *Convention on the Rights of the Child* (CRC) contains several of the classic procedural safeguards, as well as several of the traditional duties of assistance in access to justice. Most interestingly, the document adds a powerful insight on a possible rationale for interpreting such duties of assistance, when it mandates, in articles 37 through 40, that the determination, and the administration, of punishment should aim at the promotion of the child's sense of dignity and worth, at the reinforcement of the child's respect for the rights and freedoms of others, and take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive

role in society. In order to fulfill such complex system of aims, state parties then undertake to provide the child with the opportunity to be heard in any judicial and administrative proceedings affecting the child, to accord the child a prompt access to legal assistance, to provide the child with opportunities to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to accord the child a prompt decision.

Article 5 of the *Convention on the Rights of Persons with Disabilities* (CRPD) is perhaps the most explicit in committing state parties to recognize that all persons are equal before the law, and to recognize an entitlement to the equal protection and equal benefit of the law, without any discrimination.

Article 13 of this document is the first among the core treaties to use the phrase ‘access to justice’, in the context of specifying the duties of assistance that state parties undertake to fulfill. This article commits state parties to “ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages”. Crucially, this commitment includes the promotion of “appropriate training for those working in the field of administration of justice, including police and prison staff”.

3. Four challenges to human rights

Given this pattern, and different areas of concern, should we try and formulate a unified account of a general right of access to justice? Or, to put the point most concretely,

should the overarching aim of a theory of equal access to justice be the formulation of a separate body of human rights law (a new core treaty, perhaps) specifically detailing the content of a coherent system of access-rights?

Four powerful and well-known criticisms of human rights language, and law, advise against this strategy. Most importantly, they point us to where we should look for improvements and for further theoretical investigation instead.

First of all, human rights are often said to be ambiguous about their very content. Some human rights seem to contain entitlements against state, or third-party, interference. Others make explicit reference to positive obligations to institutional and material support. The first kind of human rights are typically associated with political or civil rights, like the right to free speech, to association, to freedom of religion. The second kind of human rights are instead associated with economic, and social rights, like the right to an adequate standard of living, to education, or to health. But this way of partitioning the human rights universe is only apparently clear, for all political and civil rights involve institutional and material support, and economic and social rights often involve, or presuppose, and even rely upon, prohibitions against interference.⁷ So a human right entails an ambiguous claim, as long as we do not clarify, first, how its actual content should be linked to prohibitions against interference, as well as to positive obligations to assist. As we shall see in the following, the interpretation of access rights *in particular* needs a careful assessment of the relative weight of prohibitions against state interference on one side, and of positive duties of assistance on the other.

⁷ For this point, see Nussbaum, M., *Capabilities, Entitlements, Rights: Supplementation and Critique*, 12 JOURNAL OF HUMAN DEVELOPMENT AND CAPABILITIES 23 (2011).

Second, in one dominant interpretation human rights put specific emphasis on our shared *humanity* as the normative source of Governments' commitments in their respective areas of concern. Indeed, the long list of access-rights, which we reported a moment ago, contains provisions, which apply to human-beings, and human-beings only, as the *sole* beneficiaries of state protection. So, would a human rights treaty in access to justice follow this posture, and recognize rights and obligations, which have humans as their *sole* beneficiaries too?

Third, human right law has been recently found to be disingenuous about its application and enforcement. Eric Posner recently argued that “human rights law reflects a kind of rule-naïveté – the view that the good in every country can be reduced to a set of rules that can then be impartially enforced”.⁸ It is precisely this rule-naïveté, which, Posner argues, both explains the proliferation of human rights and, relatedly, what makes the effective realization of human rights in general particularly difficult. Again, as we shall see, the recognition of access rights is a particularly easy target for the charge of rule—naïveté, unless we can provide an account of the relative value of litigation, within other forms of claim-making and contestation.

Fourth, one influential argument points out that the contemporary pervasiveness of rights talk in political discourse bears the serious risk of systematically distorting, corroding, and impoverishing public debate and deliberation; most significantly, rights talk is said to promote unrealistic expectations, to heighten social conflicts and inhibit productive dialogue between disputing parties. In this story, it is, especially, rights talk's relative silence over personal duties and responsibilities, which feeds unrealistic demands to public institutions, and thus promotes mere oppositional assertiveness over reciprocal

⁸ POSNER, ERIC, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014), at 7.

reason-giving.⁹ And again, access rights are easy targets for this kind of complaints: formal litigation itself is, in fact, standardly understood as the prime vehicle of such distortion. So, whenever we argue for the recognition of access rights are we, *also*, arguing for oppositional assertiveness, at the expense of reciprocal reason giving?

Neither one of these arguments has been explicitly thought of as making a definitive claim in the narrower field of access to justice. And yet each of them exerts significant pressure on it. In the following, I first sketch (in 3.1) a quick map of the relevant social phenomena, which rights in access to justice exert claims on, and then reconsider (3.2) these criticisms in light of this sketch.

3.1. Access to *what*?

Consider: In contemporary capitalist democracies (just to restrict the claim to where it most clearly applies) an increasingly large portion of the concrete practice of claim-making on one another and on public institutions, is mediated by very complex social technologies. The concrete use of such ‘social technologies’ of claim-making is regulated (and indeed, such ‘social technologies’ are often times themselves created) by rules of very different kinds. Some of such rules (like the Federal Rules of Civil Procedure, among many others) are legal, or, in any case, are created through formal processes of law-making and regulations. But social rules more generally play an important role as well, telling people, for example, when and how it is appropriate to raise a complaint to others, and to go to the law for help.¹⁰ And, more generally, a highly complex mixture of

⁹ See GLENDON, MARY ANN, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

¹⁰ Cfr. SANDEFUR, REBECCA, *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY* (2014);

legal and social rules, and market norms, regulate people's interactions with their lawyers.¹¹

Most times (although not always) the activation of such technologies depends on the individual choice of the claim-maker. Other times (typically in the criminal domain), activation of the relevant procedure is a prerogative of public authorities. In either case, activation is not just like pushing the start button of a self-operating machine, but it requires careful cultivation and monitoring by the claim-maker himself (or by someone acting on his behalf); indeed, even the precise identification and formulation of the specific claim that one wishes to make depends on, or typically follows, consultation and use of, as well as active engagement with, a variety of different people (partners, friends, families, neighbors, lawyers or other public officials) and a variety of resources (monetary, social or cultural, law libraries, the internet).¹²

Some of the explicit costs of such activation (like, for example, the salaries of judges, prosecutors and court's officials) are generally paid with public resources, raised by collecting taxes.¹³ Others (like lawyers' fees) are generally paid by the individual claimers themselves and their price is determined by (more or less regulated) private

¹¹ For critical descriptions of how the market for lawyers affects people's access to justice in the US, see Hadfield, Gillian K. & Deborah Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HAST. L. J. 1191 (2016); Hadfield, Gillian K, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000); Hadfield, Gillian K, *The Numbers Don't Lie: Why It's Time for Lawyers and Judges to Reduce the Regulatory Barriers to the Provision of Legal Help*, in LIMAN AT FIFTEEN: ACCESSING JUSTICE, RATIONING LAW (Yale Law School) (2011).

¹² For illustrations of this point, see Hadfield, Gillian K, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000); .

¹³ It should be remembered that this is a fairly recent institutional achievement, and *not* a universal description of (and much less a conceptual truth about) how legal systems typically finance the delivery of the services they offer; see, for example, ABEL-SMITH, BRIAN & ROBERT STEVENS, *LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750 – 1965* (1967). Merely entertaining the possibility of institutional alternatives does not imply valuing such alternatives in any way, however. See Landes, William M. & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) for a different reading of such historical fact.

markets. Others (like courts' fees) are still generally paid by the individual claimers but their price is determined by legislation or by some other form of public regulation.¹⁴

These are not the only costs connected with the concrete activation of the social technologies of claim-making, however, and it is important to include, in particular, the opportunity costs of the people involved in the activity (what else they could do, instead of fixating themselves on pursuing their claims), as well as the opportunity costs that relate with alternative uses of public resources (both generally, with regards to the *other* possible areas of social cooperation we could spend our public money on; as well as with regards to the specific claim that is being activated – i.e. on which *other* claims we could spend our public money on).¹⁵

Furthermore, there are other kinds of costs and ones for which thinking in terms of cash equivalents might not be particularly perspicuous, which are typically caused by the concrete activation of one claim, and whose variety (both in quality as well as in quantity) allows to group them together only under the most non-descriptive category of *other* (for example, the mental anguish and anxieties caused by the uncertainties of legal procedures; the breaking up of social ties and relationships; the loss of privacy over important aspects of one's life, etc.).¹⁶

¹⁴ On the funding of litigation, see generally HODGES, CHRISTOPHER, J. PEYSNER & A. NURSE, *LITIGATION FUNDING. STATUS AND ISSUES* (2012); HODGES, CHRISTOPHER (ED.), *THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE APPROACH* (2010).

¹⁵ For an empirical analysis explicitly considering opportunity costs in the explanation of litigant behavior (in particular, in the explanation of the decision to sue), see Ginsburg, Tom & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31 (2006); Ginsburg and Hoetker consider the opportunity costs of litigation in, respectively, a growing economy or in one which is slowing down, and find them relevant for explaining increases in Japanese litigiousness in the 1990s. I am referring here not *only* to such economic costs, but to personal, or subjective costs as well, whose estimation, that is, would require an evaluation of how one's life is generally going, and of the specific goals and plans one needs to put on hold, while pursuing the judicial vindication of one's rights and interests.

¹⁶ One of the great insights of Bentham's utilitarianism is that it allows one to see, immediately and with great perspicuity, the host of *non* monetary costs that the legal process might impose whenever one decides

To sum up, access rights, if they are to be effective at all in orienting social behavior should recognize formal claims in a variety of settings, social contexts and regulate a host of different social interactions. Their activation and full exercise affect the distribution of significant benefits and costs, whose nature and source substantially differ depending on the being, which is making the claim, and the social and institutional contexts in which the relevant claim is made.

3.2. The four challenges reconsidered

Let us begin with the argument on the impoverishment of political discourse through the neglect of personal duties and responsibilities. When it is seen in the larger context of a society's social technologies of claim-making, the challenge should be read as an evaluation of the overall effects of the expansion of one form of claim-making – namely, litigation over claims of right – at the expense of other avenues of claim-making and contestation. Rights talk impoverishes political discourse because it feeds one specific form of claim-making – namely, formal litigation – while starving reciprocal reason giving and compromise.

Clearly, the argument depends on the evaluation of complex empirical links, which should trace the use of a significant variety of services (like having the assistance of counsel, or going to court to press a claim), the kind of language which is used by the relevant actors to either explain or justify such use (is this language couched in terms of absolute rights, or does it rather include the recognition of personal duties and responsibilities?) and the kind of attitudinal responses which motivate the use of these

that it is a good thing to activate it, as all these costs clearly relate with measures of one's happiness. One simply needs to resist then the temptation to lump all such costs in one big homogeneous blob called 'utility'.

services and the relevant talk. *After* having established these links, we would then be in a better position to evaluate the combined effects of each factor in determining current social practices of absolutistic and oppositional assertion, or reasonable justification.

Indeed, notice that the key variable, which the argument mentions (namely, the neglect of personal duties and responsibilities in rights-talk), could just as well work in two *opposite* directions of influence. It *could* be, as the argument suggests, that it is the neglect of personal duties and responsibilities in rights talk, which is responsible for unleashing oppositional assertiveness through increased litigation opportunities. *Or*, it could be the other way around entirely: the relative neglect of personal duties and responsibilities could be driving the *perception* of oppositional assertiveness, as a reaction to changes in the costs of justified right-claims (or, as a reaction to changes – for better, or worse – in their distribution).

Either way, talk of a general right of access to justice might blind us to the central evaluative questions and concerns. As we abstract from the specific provisions of different access-rights to a single right-claim (and its corresponding obligations), we lose sight of what we need, in order to produce reasonable judgments on current institutional arrangements – an account of the interactions between, and the relative weights of, different forms of claim-making, together with a running account of their expected costs (understood in a suitably general sense), and their distribution.

A similar point can be made about the rule-naïveté challenge. The simple observation of the enormous complexities of the vast array of social technologies of claim-making in one society or another (and their significant differences, in one legal jurisdiction and culture or another) inevitably condemns as naïve and disingenuous any

view, which assumes that marginal improvements of the fulfillment of any right are a mere function of the existence of a set of rule, somehow ‘impartially enforced’. What would seem to matter, also, are the actual conditions of access to such impartial enforcement – that is, what matters is, also, who can actually make claims on the basis of such rules, and for accomplishing which concrete objectives.

And again, the invocation of a general right of access to justice might blind us in two related ways. First, because it might invite the thought that formal litigation is, in it and of itself, the key instrument for the realization of any right, whereas what we should aim for is an analysis of which aspects, within and beyond litigation, might contribute to, or hinder, the prospects of effective claim-making about one right or another.

Second, because it invites the thought that what we should aim for is a *single* model for formal litigation, to be universally applied and transplanted across legal domains and cultures. Given the variety of procedural models and techniques, even within one jurisdiction, this strategy is unlikely to be successful, however. What we should aim for, rather, is a suitably general description of the kind of outcomes we should strive for in access to justice, and then use the description of these outcomes as standards for evaluating the potentials of different models.

Consider, now, the alleged ambiguities over the content of human rights claims. Some access rights clearly justify claims to prohibitions against state interference (i.e.: the right to have the assistance of a lawyer of one’s own choosing). Other access rights involve affirmative institutional and material support (i.e.: the right have the assistance of a lawyer, regardless of one’s ability to pay for it).

What's more, a significant portion of access-rights contains combinations of *both* prohibitions against interference as well as positive duties of assistance. For example, the right to an effective remedy could be said to include both prohibitions against interference (i.e.: if I do not at least have some freedom in choosing whether to file a claim, it is hard to think how I can secure for myself an effective remedy from the competent tribunal), as well as positive duties of assistance (i.e.: in order for the Government to secure an effective remedy, it needs to provide for competent tribunals). This means that we need to be able to, first and foremost, evaluate and compare the respective contributions of each component in the general practice of claim-making.

But this also means that we might have to justify *limitations* of one component for the benefit of another. Securing the availability of a service (say, securing remedial efficacy) might require lifting prohibitions against state interference (say, limiting parties' autonomy to reach a settlement of their claims). And vice versa: securing a prohibition against state interference (i.e.: plaintiffs should be generally authorized to choose whether to join a litigation or not) might require limitations of the delivery of a service (i.e.: representative litigation aimed at guaranteeing remedial efficacy should be authorized under stringent conditions only).

The need for evaluating different combinations of prohibitions against interference and positive obligations of assistance might seem to call for a unified account of a single right of access to justice – *if* we had a reliable formulation of a general right of access to justice, we could also evaluate which specific prohibitions against state-interference should be seen as imperative of justice, and which should be let go instead for the benefit of a service, which we deem essential; and vice versa.

But the strategy is unattractive. For one thing because we don't really need it: all we need to do is to keep track, for any single prohibition against interference, and any positive obligation which we might wish to recognize, the specific reasons which justify the former or the latter. Furthermore, these reasons should be expected to have significant connections with the substantive claims, which one set of access-rights or another actually protects. We generally understand prohibitions against interference and positive obligations in access to justice in quite different ways, depending on the *substantive* claims, which are being litigated or otherwise enforced. It would seem to make a big and all-important difference, if we are considering prohibitions against interfering with a woman's choice to press charges for a sexual assault, *or* we are considering prohibitions against interfering with a plaintiff's choice not to pursue a tort-claim for product-liability instead. A single unified account of a right of access to justice would simply blind us about possible reasons for variance and differentiation in different substantive areas.

A very similar point can be made about human rights' traditional emphasis on *humanity* as the normative source of rights-claim. On the one hand, many legal systems are *already* committed to offering forms of legal protection (and, at times, ways of participating in legal proceedings too) to beings, which are not human persons. The list is long and quite heterogeneous, as it includes collections of human persons (like associations, or unions, or other legally recognized groups), or aggregations of their wealth (like corporations), as well as non-human animals. So, it is imperative then, for any approach to access to justice, to spell out more clearly the conditions upon which legal systems should confer specific access rights, and to whom exactly. And it is an imperative for any approach to *equal* access to justice to provide an account of *how* these

heterogeneous beings ought to interact with each other and with other human beings, as they go about pressing their claims in one legal system or other.

On the other hand, the extension (or the restriction) of which classes of beings should enjoy one form of legal protection, and for the purposes of protecting which concrete interests, is a subject, which is most appropriate for substantive laws and regulations. What a good theory of equal access to justice should do is to connect itself with a more general theory of substantive social justice, and then be adequately sensitive to the extensions and the restrictions on substantive entitlements, which such theory comes to recommend.

4. The plan ahead

So, what to do then? This chapter began by identifying three different dimensions of evaluative concern in access to justice, which human rights law have consistently incorporated and expanded.

Human rights law understands human beings as having a justified claim to effective legal remedies, and a justified claim to a set of procedural protections. Human rights law seems to be interested, also, in protecting forms of human agencies in legal affairs. Crucially, human rights law *doesn't* condition these claims to the possession of rationality, or to full, adult, cognitive development. On the contrary, these claims have a particular force and visibility *within* the formulation of the human rights of children and of people with cognitive disabilities.

Each of these dimensions, we noted, contributes to the interpretation of the claim to equality before the law, which is also incorporated within human rights law.

And yet, theorizations about a *general* and comprehensive human right of access to justice (that is, attempts at abstracting a single unified account of a human right of access to justice, out of the specific access-rights, which human rights law *already* recognizes) face powerful challenges.

For one thing, theorizations of a human right of access to justice need to consistently integrate the thought that people have justified claims to *both* specific prohibitions against interfering state action, as well as to affirmative institutional and material support, and they need to offer guidance on how to accommodate these two sets of claims in consistent ways.

Also, political theorizations about equal access to justice must keep a running account of the respective benefits and costs of different avenues and forms of contestation and claim making, within and beyond formal litigation, and integrate recognized entitlements within a systematic understanding of personal duties and responsibilities.

Finally, they should not pre-empt serious discussion on the extension (or restriction) of substantive entitlements to beings which are not human persons, but rather remain adequately responsive to changes in substantive laws and regulations.

So, instead of going directly to a definition of a general right of access to justice, the rest of this essay proposes to move considerably more slowly. It thus begins by saying a lot more about the three dimensions of access to justice, which human rights law already identifies, in order to explore their implications for a reasonable interpretation of equal access to justice. This is the job for the next chapter.

Then, we should say a lot more about how these evaluative concerns explain the attribution to Governments of specific duties of assistance, and possible rationales for their restriction or extension to particular classes of beneficiaries. This is the job of chapters 3 and 4, which discuss the logic for attributing a right to counsel in both the criminal and civil domains, and the rationale for recognizing a right to self-representation.

Chapters 5, 6 and 7 extend this analysis to a host of other social institutions (namely, markets for goods in general, and markets for lawyers' services in particular), which are often overlooked by human rights approaches, and yet appear to be all-important in the delivery of equal access to justice.

At that point, we should begin to have a clearer view of what a reasonable theory of equal access to justice should look like. Chapter 8 then studies four historical arguments on equal access to justice and shows their limits and insights, whereas chapter 9 studies current empirical approaches to access to justice, presents the minimal vocabulary of a CA and shows how the latter can integrate, and make successful use of, the former. This is where Part I ends.

2. EQUAL ACCESS TO JUSTICE: THREE INTERPRETATIONS

1 Introduction

Chapter 1 identified three areas of practical concern with access to justice in human rights law – remedial efficacy, procedural safeguards, and agency in legal affairs. Also, the chapter noticed that human rights law attributes to Governments specific duties of assistance in access to justice, but typically restricts them to criminal proceedings and defendants. Furthermore, human rights law seems to understand access-rights as an interpretation and specification of ‘equality before the law’. This chapter takes up the first and the third observations, and analyzes three interpretations of equal access to justice, which follow the general approach of human rights law – the ideal of equal protection, the ideal of equal standing in open court, and the ideal of agency in legal affairs – and their potential contributions for a reasonable interpretation of equal access to justice.

This chapter argues that claims about access to justice are often understood, first, as claims to a particular correspondence between the ‘rules as announced’ and the ‘rules as applied’. This is a cluster of concepts, which revolves around the ideal of ‘equal legal protection’. What we want, when we demand access to justice interpreted in this way, is a particular kind of outcome for legal procedures.

A second cluster of concepts, this chapter argues, revolves around the ideal of ‘equal standing in open court’. Claims about access to justice are understood here as claims to a particular status, a set of recognized powers and formal capacities, which grants one with opportunities for formal claim-making in a court of law. What we want,

when we demand access to justice interpreted in this way, is a particular kind of process, which is designed for adjudicating substantive claims.

A third cluster of concepts revolves around the ideal of ‘agency in legal affairs’. Claims about access to justice are understood in this case, as claims about one’s capacity to use laws to achieve goals one has reason to value. What we want, when we demand access to justice interpreted in this way, is respect for, and protection of, one’s competency to use substantive entitlements, against interference by third parties and the State.

Chapter 3 evaluates the performance of these three interpretations of equal access to justice in justifying the traditional restriction on Governments duties of assistance to criminal proceedings and defendants. Chapter 4 evaluates the case for recognizing a right to self-representation, in order to illustrate the risks of conflating one’s interpretation of equal access to justice with the ideal of agency in legal affairs.

2 Access to *what*? A reprise

Chapter 1 defined access to justice as, broadly, access to the social technologies of claim-making in a given society, or jurisdiction. This definition narrows the field of inquiry, as it points us to a general class of activities and purposes: interest in access to justice is, at base, interest in the general activity of claim-making, and in the various things that people do in response to a problem they have (or they think they have) and which demands (or they think it demands) the cooperation of others – a cooperation, which might not be forthcoming and thus ought to be sought after, or striven for. We generally claim something to someone else, when we observe a (possible) mismatch, or a gap,

between an ideal (or, more precisely, a set of dispositions and attitudes toward a specified state of affairs) which happens to have a normative grip on our thoughts and actions, and an actual state of affairs; *and* we want someone else to, at the very least, cooperate with us in order to 1) identify the mismatch, or gap, if there is one; and 2) help us to do something about it.

But this is still too general and vague. What are these social technologies of claim-making exactly? Is ‘law’ the *only* relevant ‘social technology’ we should consider? Laws certainly, and typically, offer several ideals, which do exert (and are supposed to exert) normative grip on our thoughts and actions, and legal systems traditionally institute specific places (courts, that is), where people are invited to make claims, against each other and against public institutions generally. Does this mean that ‘access to justice’ should be similarly confined to claim-making in a court of law, and to cases in which the subject of such claims is specified by substantive laws?

Furthermore, claim-making is an activity that, we generally think, only *rational* people (that is, adult human animals, who fall within a standard range of cognitive and psychological development) can reasonably participate in. Does this mean that rational people are (or should be) the *only* subjects, who can have, or can lack, ‘access to justice’ then? This would be an unattractive conclusion. For example, human rights law, as we have seen, clearly extends the recognition of access-rights even to non-rational, or adult, agents, like children and people with cognitive disabilities.

Finally, what could it mean for someone to have *more*, or *better* ‘access to justice’ than someone else? Relatedly, what could it mean to have *equal* access to justice? Does it mean, also, that one has *more* and *better* claims than someone else? Or is the quantity,

quality and content of one's claims ultimately irrelevant for determining whether one has access to the social technologies of claim-making, in general? At first blush, these questions might seem redundant. But they are not.

Having a successful and reasonable theory of what people ought to be entitled to claim (on the basis of justice, or on the basis of their equality with everyone else, or else) against each other or public institutions generally could be easily thought to implicate, or commit us (directly, and without any philosophical fuzz) to a successful and reasonable theory of the degree of access people ought to be entitled to have to the social technologies of claim-making in a given society or other. Should I be entitled to have access to the social technologies, which are designed for someone to claim X? At first blush at least, one could be excused for missing what's different, exactly, than asking the more standard and common question: 'Well, are you entitled to claim X'?

But the only way we could possibly treat these questions as just the same question in disguise, is by assuming that the concrete activation of such social technologies is costless, or otherwise effortless and with no uncertainties. And in the real world there are significant costs, as well as daunting uncertainties, connected with the identification and the formulation of any specific claim, with its adjudication in a given case, and with its effective enforcement, if normatively successful.

So, we should proceed tentatively and from the ground up, in order to fill with practical content the general formulation ('access to the social technologies of claim-making') with which we began, and define its specific domain in a clear, and practically relevant way. In the following, I explore three clusters of concepts that most actual accounts of access to justice appeal to when they describe the field, or evaluate practical

action in it: the idea of ‘equal legal protection’, the idea of ‘equal standing in open court’ and the idea of ‘human agency in legal affairs’. These interpretations are meant to track that three areas of practical concern which, we have noticed, human rights law seems to especially concentrate on – remedial efficacy, procedural safeguards, and agency in legal affairs.

So, what are people claiming, I ask, when they demand equal access to justice? And, relatedly, what do they mean by that? The next few paragraphs argue that we are well advised to interpret them as claiming either one of three things especially: 1) they demand equal legal protection – that is, they demand a particular *fit* between the ‘rules as announced’, and ‘rules as applied in concrete cases’; 2) they demand equal standing in open court – that is, they demand a particular *status* (a set of institutional powers and capacities), which authorizes them to *stand* before others in particular ways, as they make specific claims onto them, or resist to theirs; or 3) they demand agency in legal affairs – that is, they demand the protection of their ability to use laws in order to achieve goals, which they find valuable.

In the following, I discuss the broad implications for what equal access to justice would amount (or commit one) to, if one were to ground her interpretation of the latter on either one of such clusters. The conclusion I reach is that each of such clusters of concepts points us in valuable directions, and yet neither one of them is, in it and of itself, or jointly with the others, capacious enough to capture all that is practically and theoretically relevant for a reasonable account of equal access to justice. What we need, this is where argument takes us, is a coherent and unified perspective, with which to accommodate both their insights, as well as their shortcomings.

Since suspense isn't necessarily a virtue in a work of political philosophy and legal analysis, let me briefly anticipate where the analysis will take us in the remainder of this essay. In chapter 3 and 4 I analyze two practical applications of these interpretations of equal access to justice.

Chapter 5 and 6 extend this analysis to a host of other social institutions (namely, markets for goods in general, and markets for lawyers' services in particular), which are often overlooked by human rights approaches, and yet appear to be all-important in the delivery of equal access to justice.

Chapter 8 first introduces the concept of 'capability' as an empirical construct, as the best candidate we have, that is, to provide qualitatively rich and relevant descriptions of the general social phenomena relating with claim-making under the law in one jurisdiction or another. What we want from an empirical construct, this is the underlying assumption, and the corresponding test for the concept 'capability' (when it is introduced, minimally, as a tool for social description and empirical assessment) is the possibility of accommodating the insights of each of the three clusters of concepts, and the possibility of using the latter for qualitatively rich and perspicuous descriptions of the relevant social phenomena. Then, in part II, I connect these empirical insights with a more general political theory of why we should be (morally and politically) interested in equal access to justice at all, and of the political content (which will be phrased in terms of three political principles) that such interest should take in the contemporary world – this is the second (most expensive, and directly normative) use for the concept 'capability'. Part III will then come back again to the three interpretations of equal access to justice and test

the value of the theoretical hypothesis developed in part II against concrete areas of application and political controversy in access to justice.

2.1) The idea of equal protection of the law;

Consider this famous point of departure for the formulation of the goals of legal, rule-based, public decision-making (as opposed to discretionary, if not arbitrary and whimsical, rule by powerful individuals): The hallmark of legality is that it commits rulers, in a significant portion of public decision-making, to decide according to general rules that are spelled out, and known, *before* the individual decision at hand; this means that “it [is] possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge”.¹

If one begins with such a broad, but plausible, formulation of one of the most fundamental points of substantive law, an outcome-based, instrumental conception of procedural law could then provide a straightforward understanding of effective access to justice. If the hallmark of legal authority is a credible commitment to be guided, in public decision-making, by general, and known in advance, rules and standards, then whenever

¹ HAYEK, F. A., *THE ROAD TO SERFDOM* (1944), at 80. I am actually putting together two things, which should be kept apart (conceptually at least) – namely, the idea that public decision-making should be predictable and the idea that there should be some correspondence between the ‘rules as announced’ and the ‘rules as administered’. For a systematic liar, there isn’t much correspondence between what he announces and what he does (or has done in the past). And yet, his action could still be (sadly for him, in some sense), very much predictable, however. But there is an important connection between the two concepts, which might anticipate a theme, which I develop in the following pages. Since we are *not* interested in predictability from a god’s eye perspective on the legal system as a whole, but in predictability as assessed from the contingent position of differently situated individuals, then the two concepts begin to converge somewhat. We *make* ourselves predictable to others, *by* making our words match our dealings. Think of the systematic liar again: we can predict him, if we know him very well (and we know him as a liar, in fact). But if we want *strangers* to be able to predict him, then the only option would seem to be to make him stop all the lying. Thanks to FREDERICK WILMOT – SMITH, *EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD* (2019), at 83, 85, 88 (draft on file with author), for having made me think more about these issues.

such general rules and standards empower one of their subjects with a claim, such being should be entitled to obtain, to the extent that it is practically possible, whatever such rules and standards promise to give. Or, to put the point with the help of another influential general formulation, the ideal of legality requires that there should be some congruence between the ‘rules as announced’ and the ‘rules as administered’.²

So *effective* access to justice represents a suitably high level of enforcement of substantive law – a measure of the protection that procedural law grants to substantive entitlements. *Equal* access to justice, then, is a state of affairs, which corresponds to a specific distribution of such level, among the relevant population – by excluding, for example, the impact on the level of enforcement of some personal or social characteristics of the being, which is seeking legal protection. Under this interpretation, whenever we talk of equal access to justice, we are talking about a particular *fit*, between the content of substantive law, and the specific entitlements that procedural law is actually able to protect, while adding that such fit should not vary, depending on the personal, or social, characteristics of the claim holder. Procedural law, Bentham famously announced, is *adjective* law, since it qualifies the content of substantive law (like adjectives do for the nouns they refer to), by specifying the practical conditions of its enforcement.³ Consequently, equal access to justice should be, first and foremost, concerned with, and thus qualify, the practical conditions of enforcement of substantive laws.

² FULLER, LON, *THE MORALITY OF LAW* (1969), at 69.

³ See Bentham’s clear formulation in the *Principles of Judicial Procedure*: “For in jurisprudence, the laws termed adjective, can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it”, collected in *WORKS OF JEREMY BENTHAM*, published under the Superintendence of his Executor, John Bowring, Vol. II, (1843).

The great advantage in understanding access to justice in this way is that it immediately directs the interpreter to consider aspects of judicial administration that can be (more or less easily) operationalized, and then measured. For example, one could then begin with a list of rights that valid laws in one country recognize and then measure the extent to which the actual enforcement of such rights (in cases of violation) tracks their substantive content.

Not surprisingly, many contemporary research efforts in the field typically approximate this general posture, or reasonable sophistications of such posture, and share a tenable and considered commitment to an outcome-based, instrumental, conception of procedural law.⁴

Its great advantages notwithstanding, a rigidly outcome-based, instrumental conception of procedural law has a number of important blind spots. First, it might commit one to too much, and to what one does not know *yet*. *Before* concluding that granting effective legal protection to any list of rights, privileges or other goods, is a valuable aspect of any legal system, one should be invited to justify why the rights, privileges or the other goods in question should call for, or command, effective and equal legal protection at all. For example, some legal systems recognize unequal rights to husbands and wives over family resources. But it would be an embarrassment for the ideal of equal access to justice if commitment to it committed one, also, to the effective enforcement of husbands' unequal rights in family matters. This means that a reasonable approach to access to justice should connect its practical judgments in the field of procedural law to larger accounts of what social justice demands to substantive law. In

⁴ See, for example, the various indexes elaborated within the so-called World Justice Project, *WJP Rule of Law Index 2017 – 2018*, at <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018>.

fact, there are at least two interconnected distinctions which provide competing interpretations of the normative content of substantive law, and which, consequently, may burden a merely instrumental formulation of the goals of procedural law, and the understanding the latter provide of the point of equal access to justice, with daunting ambiguities. For one thing, we should distinguish between the *formal* content of substantive law, and the policy objectives, which motivate its enactment. Also, we should distinguish between the enforcement of substantive law as a specific *result* of formal cases, and general compliance with substantive law as an entrenched practice of the relevant population. Merely invoking the instrumentality of procedural law to the enactment of substantive law is not enough to provide an interpretation of effective access to justice (and, much less, to provide an interpretation of *equal* access to justice), *before* one proposes reasonable criteria to adjudicate cases in which, for example, literal application of the legal text distorts the realization of the policy objectives which motivated the latter's formulation; or, before one proposes reasonable explanations of how legal decision-making in courts of law affects changes in social behavior generally.

Second, an instrumental approach to procedural law, motivated by a reasonable interest in the predictability of substantive law works best to give an account of, and justifications for, law's deterrent functions against harmful behavior. By increasing law's predictability, we increase individuals' capacities to anticipate the consequences of their behavior and, thus, we make sure that legal subjects can effectively respond to substantive law's signals, even before resorting to formal proceedings and adjudication. Notice that this much should create valuable room for considering egalitarian demands within the administration of justice, since what matters, under this interpretation, is *not*

predictability as assessed by a God's eye perspective on the legal system as a whole, but, rather, predictability as assessed from the contingent position of differently situated individuals. But an interpretation of equal access to justice from the point of view of the deterrent function of substantive law is not enough. At times, the activation of legal proceedings (like when one demands the delivery of a welfare benefit) is not intended to deter anyone. Other times, the activation of judicial proceedings, like when one challenges the constitutionality of a specific institutional practice, is intended to alter social behavior, without relying on deterrence alone, but, rather, by altering the structural conditions (like the segregation of public schools), which inhibit the conformity of social behavior with constitutional norms. In these cases, the instrumentality of procedural law (and thus, the interpretation of equal access to justice which the former inspires) should be assessed against the whole background of the instrumentality of public institutions generally, in affecting social and institutional change.

Third, a rigidly outcome-based, instrumental conception of procedural law sells Bentham's famous metaphor far too short. If procedural law is an adjective that *qualifies* its noun, which is substantive law; then evaluating the quality of procedural law means that one should be able to identify *what* exactly the former *adds* to the quality of substantive law itself. A well-chosen adjective tells one important and salient features of the noun it applies to, enabling one to discriminate among different exemplars of the same *thing* (a warm welcome, a malevolent look, a killer question, and so on). Out of the metaphor, this means that the conceptual toolbox that one should use when evaluating the quality of procedural law should allow one to discriminate and distinguish among otherwise similar outcomes, in light of the way such outcomes have been reached. The

evaluation of procedural law could very well be anchored to the evaluation of the outcome it produces, provided that it includes, also, an *independent* assessment of how such outcome was reached. From the point of view of access to justice, this means that one should not look for mere descriptions of the outcomes of legal procedures, and not even simply for assessments of which procedures tend to produce particular desirable outcomes. Rather, a reasonable approach to access to justice should tell us why social protection of a particular right, privilege, or other good is a valuable thing, *and* why such social protection should be organized through laws and not through some *other* social mechanism.

Finally, an outcome-based approach to procedural law should account for aspects of the relevant outcomes, which are obscured by the exclusive focus on the correspondence between the ‘rules as announced’ and the ‘rules as applied’, even when the approach itself is most narrowly centered on the deterrent functions of law and, relatedly, on the value of predictability in public decision-making. Deterrence and predictability are geared to legal subjects’ expectations about officials’ conduct in public decision-making. But the concrete expectations, which are acted upon by legal subjects, are not about the substantive content of authoritative decisions, and that only. Rather, they include estimations of the expected costs of these decisions. So one relevant class of adjectives, with which we should be able to qualify relevant substantive outcomes, ought to refer directly to the price (understood in a suitably wide sense) of such desired correspondence, and thus allow us to estimate how the former affects the desirability of the latter.

2.2) Equal standing in open court

A rather natural way to pick up some of what the idea of ‘equal legal protection’ leaves out in the interpretation of access to justice is to explore the cluster of concepts that revolve around the idea of ‘equal standing in open court’. Indeed, it is very common, and often implicitly understood, that when one claims that someone has a right of access to justice, what she means is that one has a right to a *justiciable* claim in a court of law – that is, that one has standing to claim something in a court of law.

If one then joins this idea with the idea of ‘legal protection’ discussed above, what one gets is a much more nuanced understanding of the point of procedural law from the point of view of equal access to justice. Thus, the demand for equal access to justice is not just the demand that the legal consequences that follow from individual conduct should be predictable. Rather, it is the demand for predictability, arrived at in particular ways. On one hand, public decision-making should be predictable because it reaches decisions by leaving ample room for contestation and argument on the merits of the substantive rules that decision makers are obliged to follow. On the other, public decision-making should be predictable because those who can seek a legitimate advantage from it can make claims on its actual content and activate the institutional machinery that is designed for deciding.

In the juridical context, *standing* has a rather technical and narrow meaning. Traditionally, systematic or comparative studies on *standing* begin by distinguishing, first, between the civil and the criminal domain; and second, by distinguishing between rules which allocate powers to initiate, resist, or join, claims in courts, and rules which, given the former allocation, distribute the costs of legal proceedings among its parties and

public authorities and determine what the latter must do to protect the parties who are priced out by such costs.⁵ Standing rules could just as well refer to both criminal and civil procedure, but systematic inquiries on such rules typically put more emphasis on standing in the civil domain only, and then avoid any discussion of the *different* rules (which are not, in fact, technically speaking, rules about standing) that govern the distribution of costs in legal proceedings.⁶

When one says that one has *standing* what one means is that some conditions are met (such as that the party is able to show a personal interest in the issue being litigated) for the law to confer one institutionally recognized powers to initiate, or resist, or join, a claim before a court – having standing typically means that one has a recognized *status* (that is, a set of institutional rights, powers, privileges and immunities) with respect to a specific institutional, adjudicative, procedure. And yet, the classic focus for comparative inquiries on *standing* typically takes a narrower perspective on which powers and opportunities law grants to private citizens, to activate proceedings of judicial review against administrative acts and decisions.

Furthermore, one classic area of comparative studies on standing focuses on the latter's modifications in collective, or representative, litigation. Traditionally, the issue here is to determine under which conditions and for which practical purposes it is a good idea, for a legal system, to design litigation mechanisms, like class actions in the US, that could accommodate the aggregation of common claims, or the pursuance of collective

⁵ See generally MARIOLINA ELIANTONIO, C. W. BACKES, C. H. VAN RHEE, T. N. B. M. SPRONKEN & A. BERLEE (EDS.), *STANDING UP FOR YOUR RIGHT(S) IN EUROPE. A COMPARATIVE ON LEGAL STANDING BEFORE THE EU AND MEMBER STATES' COURTS* (2013).

⁶ See HODGES, CHRISTOPHER, J. PEYSNER & A. NURSE, *LITIGATION FUNDING. STATUS AND ISSUES* (2012); HODGES, CHRISTOPHER (ED.), *THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE APPROACH* (2010).

ones, through a single claimant, who represents (and acts on behalf of) an entire class, or group of individual claimants, who typically do not participate to the litigation itself and yet are bound by its final outcome. Standing rules integrate here with rules about claim or issue preclusion, and work to extend the effects of the outcome of one litigation to its non formal parties as well.⁷

Finally, a substantial body of literature specifically studies access to Supreme Court litigation, the rules and doctrines which determine under which conditions one case could be heard by a Supreme Court, and which consequences follow from restricting or expanding the parties' powers to participate in Supreme Court adjudication.⁸

These are all important and useful distinctions, which track significantly different aspects of what the idea of 'equal standing in open court' could itself stand for. What kind of connection to the issues being litigated must one show in order to initiate, or resist, or join, a claim in court? How should we distribute the costs of legal proceedings among the State and the parties? How far should Governments intervene in order to guarantee the effective exercise of the procedural rights and opportunities that follow from having standing to litigate an issue? How much power should we give to private parties to contest laws and regulations enacted by legitimate legislative authorities? How

⁷ See, for general references, Bone, Robert G., *Class Action*, in *PROCEDURAL LAW AND ECONOMICS* 67 (CHRIS WILLIAM SANCHIRICO ED., 2d ed. 2012); Taruffo, Michele, *Some Remarks on Group Litigation in Comparative Perspective*, 11 *DUKE J. COMP. & INT'L L.* 405 (2001); Rubenstein, William B., *Finality in Class Action Litigation: Lessons from Habeas*, 82 *N.Y.U. L. REV.* 790 (2007); HENSLER DR, C. HODGES AND I. TZANKOVA (EDS), *CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION* (2016); Hodges, Christopher, *Collective Actions*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* (P. Cane and H. Kritzer eds.) (2010); and, more generally, see chap. 7 of this essay.

⁸ For a most detailed comparative study on the access to Supreme Courts' adjudication, see GIANNINI, LEANDRO J., *EL CERTIORARI. LA JURISDICCIÓN DISCRECIONAL DE LAS CORTES SUPREMAS* (2016); see also, most recently, VAN RHEE, C. H. & FU, Y. (EDS.), *SUPREME COURTS IN TRANSITION IN CHINA AND THE WEST: ADJUDICATION AT THE SERVICE OF PUBLIC GOALS* (2017) and, on appeals and means of recourse more generally, see VAN RHEE C. H. & A. UZELAC (EDS.), *NOBODY'S PERFECT. COMPARATIVE ESSAYS ON APPEALS AND OTHER MEANS OF RECOURSE AGAINST JUDICIAL DECISIONS IN CIVIL MATTERS* (2014).

many chances should we guarantee to private parties to appeal against judicial decisions, which disfavor them?

Correspondingly, the use of the idea of ‘equal standing in open court’ as a conceptual tool for understanding what the demand for ‘equal access to justice’ could amount to, should take adequate account of such differences. And yet at the same time, failing to see the intimate connections between the answers that one should give to each of such questions might be damaging for a reasonable theory of access to justice.

Most importantly, notice that the very ideas of ‘equality’ that lurk behind each of such fields are quite different from each other, and yet one needs an integrated understanding of all such different ideas, in order for each one of them to legitimately count in reasonable practical discourse.

i) In the first field (the narrow, and most common, interpretation of *standing* as the conditions that allow for the attribution of powers to activate the judicial machinery of legal adjudication), equality could mean, essentially, that the *same* rules apply to every prospective party and to any possible legal issue that may arise. If like cases should be treated alike, then like cases should allow for the participation of like parties – that is, they should allow for the participation of parties that are similarly situated with respect to the issues that they involve. This is *formal* equality, since it imposes a common, and equal, standard to all. All one needs in order to be able to criticize the US Supreme Court’s infamous *Dred Scott* decision⁹, which denied Scott’s standing to sue in a Federal Court on the grounds that, being a “negro, whose ancestors were imported into [the US] and sold as slaves”, he could not be an American citizen, is to notice that the Court is drawing an impermissible distinction among people, in virtue of which members of a

⁹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

specific 'race' are assigned to a lower status with respect to the attribution of the formal powers that are attached to citizenship.

ii) The attribution of formal powers to private parties (or public authorities) to initiate a claim (or to resist to one made by others) authorizes such parties to impose costs on others (and the state) and reap benefits off such activity. When John is authorized to sue Rick in a court of law, John is authorized to impose costs on Rick, as well as on the public at large. These could be direct, monetary, costs (for example, Rick might have to look for, and then hire, a lawyer for his defense), opportunity costs (Rick, and John himself, might have to postpone the realization of more productive activities in order to cultivate their claims against each other; the time that public officials have to dedicate to John's claim could be allotted to other claims or activities, etc...), as well as non monetary, personal and subjective costs (Rick might believe, correctly, that, John's claims notwithstanding, *he* is right and able to prove it, and yet might resent, or be worried about, or anxiously brood over, the fact that he has to justify his actions in front of a group of strangers, exposing himself to their critic and judgment).

This means that the determination of which conditions one should meet in order to be authorized to initiate a claim in court, and how these relate, in turns, to the *effective* exercise of the powers they grant (which determine *who* can actually reap off the benefits of trials), is directly relevant to the fair distribution of the costs which are connected to the use of trials as a general mechanism for enforcing substantive law; and this is the classic topic of the second field listed above, which studies the costs of legal proceedings.

But a merely formal understanding of the demands of equal treatment is not enough here. For example, *formally* equal expansions of people's opportunities to bring actions in courts of law, which do not track *substantively* equal expansions of people's power to *effectively* do so might have unfairly regressive effects, since they might authorize the relatively better off to reap off the benefits of trials while imposing the latter's costs on the relatively worse off. Thus, an interpretation of what equality demands requires here a more substantive interpretation of what parties can effectively do, as opposed to what they are merely formally entitled to, *once* they are allowed to participate in a trial. This, in turns, requires an interpretation of what might count as a resource in effectively litigating a claim, what might count as a cost, as well as what public authorities can do to fairly redistribute both, and for which concrete practical purposes it is a good idea for them to do it.

iii) The same argument applies with a vengeance in the third and fifth fields (which study, respectively, standing in proceedings of judicial review and access to Supreme Court litigation). On one hand, the costs of Supreme Court litigation are typically higher than the costs of ordinary trials, since a claim that reaches the Supreme Court has to go through a long process of subsequent appeals and further litigation. So, the determination of the extent to which *formally* equal powers of appeal actually track substantive opportunities to litigate is all the more relevant for determining a fair distribution of the general costs of litigation.

On the other hand, judicial review presents one with the vexing question on how far non-elected officials like judges, who thus lack a clear democratic mandate, should intervene upon (and modify, or annul) the activities of elected officials (like legislatures).

Thus, the question on how far formal powers to activate proceedings of judicial review actually track substantive powers to litigate effectively relates directly to the more general question of how much influence private parties should have in advocating for social reform, through courts. Thus, understanding what equality demands requires an interpretation of what equal influence in public decision-making could amount to, and an analysis of the legitimacy (and effectiveness) of the use of courts as instruments to stir social change against recalcitrant majorities (or against well organized minorities who take advantage, in the legislative process, of the coordination failures of dispersed majorities).

Crucially, the underlying issues are not exclusive to judicial review, however. Regardless of one's more general and systematic philosophical persuasions about the nature of law, the extent to which standing rules, that apply to Supreme Court litigation especially, actually track effective powers to litigate (and thus, one's ability to reap off the benefits from their exercise) is directly relevant to which limits democratic legitimacy should impose to the authority of judges.

Consider the following theoretical alternatives: If one is a radical realist who believes in the global indeterminacy of law, effective powers to participate in Supreme Court litigation simply track, by definition, the development of substantive law. If the law is nothing but what judges of last instance say and formal legal rules do not constrain the latter's decisions at all, then the law sides, by definition, with whomever has effective access (or, comparatively *more* effective access) to judges' of last instance.

If one is a moderate realist who believes in the *local* indeterminacy of law, the identification of effective powers to participate in trials tracks the distinction between

what, in that particular legal system, could count as an easy case, and what could count as a hard one. The so-called selection effect, which purportedly explains why, in some legal systems, few cases reach the level of appellate review, typically assumes that parties have at least roughly equal powers to develop arguments, produce evidence items, persuade judges and juries and, in sum, litigate their claims. The extent to which this is *not* so (that is, the extent to which parties do *not* have equal effective powers to litigate, even when they have formally equal powers to initiate claims) should track the distinction between cases that are *not* heard, and yet they are not easy because the law does not unequivocally settle the matter, but habitual behavior favors the powerful (for example, cases about the constitutionality of segregation at the beginning of the 20th century in the USA), and cases that are *not* heard because they are easy, the law unequivocally settles the matter and habitual behavior tracks valid legal norms; and the distinction between cases that *are* heard and yet they are not hard but the law unequivocally settles the matter in favor of the powerful, and there exists deviant behavior by both the powerful and the powerless, and cases that *are* heard because they are hard, the law doesn't unequivocally settle the matter and habitual behavior does not track the content of valid legal norms.

If one is a legal formalist who believes that the law is a closed system of perfectly coherent rules, which provide one (and only one) correct answer to any legal controversy, then tracking effective powers to participate in trials allows one to predict to which concrete questions the law will actually provide an answer to – and thus effective powers to participate in trials determine what the law on the ground (as opposed to the abstract, perfectly coherent, and gapless system of rules that inhabit the minds of lawyers and judges) actually is.

iv) The fourth field, which studies *standing* in collective, or group litigation, most explicitly calls for an integration of the various ideas of equality mentioned so far. Consider two of the most typical (and standard) justifications for the introduction of forms of group litigation. Many accounts justify some forms of group litigation when the costs of enforcing *individual* claims are significantly larger than the benefits that each individual claimant can win on its own.¹⁰ Thus, the introduction of group litigation (authorizing one individual to sue on behalf of all, and then share with them what he or she wins) is meant to avoid under deterrence of otherwise socially damaging conduct.

Other accounts justify group litigation when it promotes remedial efficacy by facilitating the concession of *indivisible* injunctive or declarative relief against socially harmful conduct against specific and otherwise homogenous groups.¹¹

Either way, an interpretation of what equality demands here requires one to analyze when *formal* equality in standing rules (the general rule that governs individual participation in trials) does not guarantee either a fair distribution of the costs of legal proceedings, or equal influence upon public decision-making. Correspondingly, a reasonable theory of equal access to justice from the point of view of ‘equal standing in open court’ calls for an explanation of why formal equality in standing rules is generally a good idea, and when, and for which practical purposes, it could be superseded by the demands of fairness in the distribution of public resources, and the requirements of equal influence upon public decision-making.

¹⁰ See, for example, Kalven, Harry & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941) and Kaplan, Benjamin, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967). See, more generally, chap. of this essay.

¹¹ See, for example, Chayes, Abram, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). See more generally chap. 13.

2.3) The idea of human agency in legal affairs;

Both the idea of ‘legal protection’ and the idea of ‘equal standing in open court’ give one valuable and important insights for interpreting the demand for equal access to justice. The idea of ‘legal protection’ directs one to look for, what Charles Taylor calls, exercise-concepts. That is, when one claims that Governments should guarantee equal access to justice for all what one means, under this interpretation, is that Governments should organize legal institutions and proceedings in such a way that a particular *kind* of end-result, or state of affairs, is guaranteed to all, on an equal basis. The idea of ‘equal standing in open court’, instead, directs one to look for opportunity-concepts – that is, what one demands, under this interpretation, is not just an end-result, or a final state of affairs, contradistinguished by a specific desirable level of enforcement of substantive law. Rather, what one should demand is that Governments organize legal institutions and proceedings in such a way that the particular end-results that the idea of ‘legal protection’ describes could be the object of specific claims, and, thus, that the actual conditions that allow for the effective vindication of such claims equally authorize each and everyone to invoke the protection of the laws.

Both ideas have limits, however, as we have seen. Focusing on end-results, and on end-results only, might blind one about what exactly the *way* in which an outcome is reached might *add* to the quality of the outcome itself. Whereas focusing on people’s opportunities to make claims in a court of law (and only on people’s opportunities to claim in a court of law) might blind one to what happens *before* a claim actually reaches the doorsteps of a courthouse, about the important activities that do *not* involve claims

(for example, rendering testimony), about plausible alternatives to court battles and conflicts (for example, extra-judicial political activism and mediation) and about the significant social costs produced by the over-reliance on courts as the preferred mechanism for conflict-resolution. Moreover, appeal to the idea of ‘equal standing in open court’ calls for a systematic integration of the various dimensions of reasonable demands for equality. The demands for formal equality, for fairness in the distribution of public resources and for equal influence in public decision-making, all play, as we have seen, an important and complex role in understanding what a reasonable demand for ‘equal standing in open court’ could amount to.

The exploration of the idea of human agency in legal affairs might provide one with further insights on how to proceed. For one thing, the idea itself of human agency could just as well be used to refer to both opportunity-concepts (pointing to the necessary and sufficient conditions for one to be able to exercise one’s agency in the legal world), as well as to exercise-concepts (pointing to one’s actual conduct in the legal world, and determining the extent to which the latter actually tracks one’s own evaluations and choices). Second, it offers one a rather wide focus and target, allowing one to investigate people’s interactions with laws and regulations, even *beyond* formal claim making (against someone) in a court of law. Furthermore, the idea of human agency might give one both a plausible candidate for the determination of the ends of legal protection (i.e., the protection of people’s agency), as well as an exacting criterion for the evaluation of the appropriate means to such ends (i.e., meaningful participation by interested parties in adjudicative procedures).

So, under this interpretation of equal access to justice, one should begin by providing a reasonable interpretation of what human agency in legal affairs could mean. For example, it could mean that one can 1) competently formulate and rehearse in one's mind the normative content of valid legal rules; 2) anticipate, through imagination, the possible consequences of acting on such normative content; 3) think through the reasons one might have for acting one way or another; and then 4) act on such reasons.

Then, one should test the extent to which legal institutions and proceedings actually guarantee such competent use of legal rules. A commitment to equal access to justice would then mean that Governments should guarantee real opportunities for everyone to competently use laws, in order to pursue goals that he or she has reason to value.

This is still quite abstract and vague, and much work would need to go then in specifying the relevant details – What does *real* opportunities mean? How can one define *competency* in legal rules? Is competency here a value-neutral concept, or does it require normative-political evaluations? Is *individual* competency the goal? Or is competency through *surrogates* (like lawyers), an acceptable standard?

Despite these interpretative doubts, it is not difficult to find traces of very similar formulations (and the valuable logic, grounded upon the idea of human agency, that lurks behind them) in many landmark cases on access to justice world-wide.¹²

So, appeal to the idea of human agency in legal affairs provides one with reasonable and exacting practical guidance over the interpretation of the demands for equal access to justice. But is it enough? Or, alternatively put, should a reasonable theory

¹² See, for example, *Bounds v. Smith*, 430 U.S. 817 (1977); *Golder v. United Kingdom*, 4451/70, ECHR 1, (1975), which are discussed in chap. 12.

of equal access to justice merely rely on an interpretation of what the protection of human agency in legal affairs requires? No, it should not.

First, and quite generally, because often times legal systems should guarantee legal protection even when the subjects of such protection cannot be understood as autonomous agents, or *adult* or even *human* agents at all. At times, laws reasonably provide for the legal protection of non autonomous agents (like non human animals, or children and young adults, or people with mental or physical disabilities which pose temporary or permanent obstacles to their full agency), by, for example, granting *standing* to surrogates who are then authorized to act on their behalf. In these cases, the normative issue is to assure equal and meaningful participation to the protected parties even when they fall short of the requirements of full human agency.

The issue in *Bounds* and in *Golder* was *not* how to guarantee the protection of the agency of prisoners in enforcing their rights. If it were, then no challenge could have been raised against the *status quo* since the assumption was, quite reasonably, that prisoners cannot act in their full capacity of agents, for the time they remain in public custody. Rather, the issue was about choosing the most appropriate means to guarantee an equal and meaningful participation of prisoners (one that could grant, that is, the fair adjudication of their rights) *despite* the fact that they could not act (albeit temporarily) in their full capacity of agents. So, a reasonable theory on equal access to justice should not tie its hands and feet to the idea of human agency in legal affairs. Rather, it should work out appropriate conceptual tools in order to comment on and criticize what meaningful and equal participation demands for beings that cannot (either permanently or momentarily) act in their full capacity of human agents.

Second, the practice of imagining concrete standards for human agency in practical matters bears the serious risk of relying too closely on what *standard* social conditions are like, and then blinding the interpreter to think appropriately through situations when standard social conditions are *not* met. This is problematic since standard social conditions are, at least typically, *arbitrarily* defined and thus their unquestioned assumption might prevent one from effectively criticizing an unjust *status quo*. People with hearing or speech impediments (either temporary or permanent) might not be able to act as full agents in the protection of their rights, as long as being an agent is interpreted, in standard conditions, to involve to *speak up*, with a loud and confident voice, in defense of one's claims, in front of an audience of one's peers. But this observation supports no legitimate claim on these people's agency, in legal affairs and elsewhere. Rather, it points to the injustice of organizing institutions around the arbitrary assumptions imposed by the unquestioned acceptance of what standard social conditions (the understanding of defending one's self as the activity of standing and of speaking up, with a voice which can be heard) for people without speech or hearing impediments, are like. So, a reasonable theory on equal access to justice should work out appropriate conceptions of what equal and meaningful participation in legal proceedings should amount to, and then assure that ample room and effective powers are given for the re-organization of standard social conditions and for the creative conjunction of the abilities of differently situated individuals.

Third, exclusive reliance on the requirements of human agency in legal affairs (if such requirements are then understood, as they typically are, as a list of basic liberties that pertain to each individual) might blind one on the appropriate *limits* that legal

systems might have to reasonably impose on access to justice in order to protect *equal* access to justice for all. In many traditional and reasonable interpretations, the limits that Governments are authorized to impose on the basic liberties that protect human agency are understood in merely formal terms. In one famous and apt formulation, everyone should be entitled to “the most extensive basic liberty compatible with a similar liberty for others”. This makes a lot of sense even in the field of access to justice: John should be entitled to file any number of motions that he likes, whenever he prefers, asking whatever he thinks he is owed. But for trials to proceed in an orderly fashion (and guarantee John’s entitlement to file any motion he likes), it is reasonable to impose limits to, for example, *when* he should be actually authorized to file a motion, and what exactly such motion should formally contain in order to count as a valid claim.

And yet, formal equality is not enough for a reasonable interpretation of equal access to justice, as we have already seen. Formally equal powers to appeal against unfavorable decisions, when these formal powers do *not* track substantively equal powers to litigate, might simply authorize the relatively better off to exploit the benefits of legal proceedings, by imposing their costs to the relatively worse off, without (and this is the crucial observation) any substantial harm to the latter’s basic liberty to litigate. Clogging the Supreme Court with trivial cases might not harm anyone’s basic liberty to litigate (at least not directly), as people could still appeal to the Supreme Court as much as they like. What it *could* harm, however, (and harm disproportionately the relatively worse off) is some people’s ability to *transform* their formal power to decide when, or how, and why, to litigate a claim, in an effective tool for the protection of one’s rights.

3. The three interpretations of concepts in practical argumentation: two illustrations

The point of this chapter was to highlight, through general and broad formulations, both the value, as well as the limits, of focusing on either one of three clusters of concepts, for the interpretation of equal access to justice. General and broad formulations are useful, in this context, because they allow one to call up, and then identify, general intuitions on the relevant subjects of inquiry. But we shouldn't take their conclusions at face value, however. We need, also, careful observations of their use (and, thus, their performance) in practical matters. Observing their performance in practical matters shall allow us to identify more precisely where we need more work if we want to save their insights, without succumbing to their limitations.

The next two chapters discuss two specific practical issues, in particular. Chapter 3 discusses the practical relevance of the distinction between criminal and civil cases for conceptualizing equality in access to justice. Should we give any weight to such distinction? And if so, how much weight, and for which concrete practical arguments? In particular, can we rely on the criminal/civil distinction to explain (and justify) differences in the recognition of a right to be assisted by counsel?

Chapter 4 discusses the so-called right to self-representation at trial. Should we understand the right of self-representation as an essential institutional component of what equal access to justice should commit us to? Can people on trial count as equals, when we oblige them to have the assistance of counsel? And, conversely, can people on trial count as equals, if we authorize them to represent themselves?

In both cases, the three interpretations of equal access to justice provide us with a powerful conceptual arsenal to identify the relevant practical issues. And yet, as we shall

see, in both cases we can identify a number of significant limitations, which prevent them from organizing our thoughts in sensible ways.

3. DUTIES OF ASSISTANCE AND THE CRIMINAL/CIVIL DISTINCTION

1. Introduction

Chapter 1 noticed that human rights law tends to restrict the recognition of public duties of assistance to criminal proceedings and defendants. This is not an idiosyncrasy of human rights law. On the contrary, it is very common, for many national constitutions worldwide, to give practical relevance to the distinction between criminal and civil cases in the allocation of specific access rights, like the right to counsel. So, for example, the US Constitution is now standardly read to guarantee an absolute, or categorical, right to counsel to the criminal defendant and only a conditional right to counsel to parties in civil proceedings.¹ Indeed, preference for the criminal defendant over the civil plaintiff or the civil defendant in the allocation of some fundamental aspects of access to justice seems to express an entrenched, and very common, value judgment.

And yet, one should be careful, however, in identifying, and then appropriately qualifying, the precise arguments that one should use in giving practical relevance to the distinction between criminal and civil cases. The point of this chapter is to critically discuss and comment on one common argument that seems to vindicate such preference in a way that, however, might lead to exaggerate its concrete practical scope. Then, this chapter proposes a different argument that could rationalize such preference and yet at the same time, blur the distinction between criminal cases and civil cases for many practical purposes. Finally, I shall come back to the three interpretations of equal access

¹ This is, famously, the work of *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the landmark Supreme Court decision, which first interpreted the Six Amendments' rights of the accused, to include a categorical right to counsel.

to justice discussed in chapter 2, and comment on their possible uses in constructing sensible practical arguments in the field.

2. On qualifying the practical relevance of the distinction between criminal and civil cases in equal access to justice: The perils of being right for the wrong reasons

Let us begin by illustrating one intuitive, and yet ultimately unsuccessful argument, which purportedly justifies a general right to counsel for *any* party to a legal proceeding.

The hallmark of legality, we have noticed, is that it commits rulers, in a significant portion of public decision-making, to decide according to general rules that are spelled out, and known, *before* the individual decision at hand; crucially, this should allow for the possibility “to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge”.² Now, if valid legal rules should determine *which* individual circumstances of any given case actually govern the decision at hand, excluding the relevance of anything that is *not* explicitly contemplated in the rule itself, so that relevantly similar cases are actually decided in predictably similar ways, then one’s ability to invoke the protection of the law should *not* be determinative of how cases are concretely decided. At base, this means that the amount of law one should be able to get should *not* be a function of one’s ability to pay for it. Insert now the empirically falsifiable, but intuitive, understanding that professional lawyers (and their comparative abilities) play a crucial role in the determination of who wins at trials and there you have a general argument for the recognition of a general right to counsel, protecting those who are priced out in the market for lawyers.

² HAYEK, F. A., THE ROAD TO SERFDOM (1944), at 80.

The argument does not work, however, as we shall see in a moment. But first, let us see how beginning with it typically then leads one to conclude that it is reasonable to restrict the recognition of a right to counsel to criminal cases and criminal defendants only, and exclude (at the very least) civil plaintiffs altogether.

The need for restricting the scope of the right to counsel to the criminal defendant arises once one notices the difference in posture between the criminal defendant and the civil plaintiff with respect to the power to activate the relevant proceeding. In the case of the criminal defendant, the power to activate the trial, which he participates in, rests (at least in contemporary legal systems) with public authorities; whereas in the case of the civil plaintiff, the power to initiate a trial rests with a private actor (the plaintiff itself). Correspondingly, the attribution of a categorical right to counsel to the indigent civil plaintiff has the practical effect of entrusting *more* private actors with the *actual* power to impose costs on others (including the state), in light of what they see fit, and conducive to their own interests. Fiscal responsibility should then make one worry about a standard ‘opening the floodgates’ argument. To enable indigent parties to sue (granting a lawyer to anyone who claims he needs one) is to open the floodgates to possibly even *more* frivolous and wasteful civil litigation.

So, we began with a commitment to a general right to counsel and then found ourselves forced to impose a stringent restriction on its scope by considering the concrete technology of its delivery in the criminal and civil domains. Notice, however, that this line of argument rationalizes the practical relevance of distinction between the civil and criminal domains, but doesn’t really *use* it in any material way. The point of the argument is to distinguish between the criminal defendant and the civil *plaintiff*. Which prompts the

question: what about the civil defendant? *He* doesn't decide *when* to start litigation, so the argument flowing from the 'technology of delivery' of the relevant service should say nothing about *him*. This is a fair point, but we shouldn't rely on it just yet. Defendants in civil cases are generally authorized to, and often do, make *counterclaims*, and do not simply resist (or defend themselves) against claims made by others. Civil defendants often can bargain their way out of the cases they are a party to by finding agreements with the other party. Which means, minimally, that the respective positions of plaintiffs and defendants in civil cases is contingent on the strategic decisions of *both* parties, in a way that the respective positions of the State and the accused are not, in the typically criminal scenario. So, *before* we can make the distinction between civil plaintiffs and civil defendants work in the relevant argument for the recognition of a right to counsel, we need a better grasp of the point of distinguishing between criminal and civil cases in general. This is the work of the final paragraph of this subsection. (By then, however, we will have a better understanding of why the distinction – no matter how one construes it – shouldn't count as directly dispositive in the relevant argument for the recognition of a right to counsel).

Let us carefully work our way back then to find out where an even more fundamental problem lies. One big problem lies in the merely *formal* understanding of equality that lurks behind the argument with which we began, and which purportedly justifies a categorical right to counsel in *all* proceedings. The principle of legality, as we have formulated it above, supports, in fact, a merely formal interpretation of equality in procedural law. *Treat like cases alike* could just mean that *all* parties to judicial proceedings should have the same *formal* opportunities to litigate their case. If we restrict

our interest in access to justice to seeking an appropriate fit between ‘the rules as announced’ and the ‘rules as applied’, we correspondingly restrict our interest in what *judges* do. Do judges consider the parties’ wealth (for example) as relevant when deciding cases? If they do not, and we are granting each affected party a chance to litigate the relevant issues, it is not clear at all that we are not, also, *treating like cases alike*. So, the argument flowing from a formal understanding of legality doesn’t simply restrict the scope of a right to counsel. It *also* leaves us with no ground to recognize the relevant right in the criminal domain, and no argument with which to impose reasonable *limits* on wasteful use of procedural resources by relatively wealthier parties in the civil domain. The fact that Rick wastes public resources by cultivating frivolous claims against whomever has the bad luck of finding himself on Rick’s way, poses no threat to John’s formal opportunities to litigate as many claims as he likes (which is all that a formal understanding of equality would have us care about). And yet Rick’s decisions *do* have an impact on John’s ability to *effectively* litigate his own claims (i.e., if courts are clogged with frivolous suits, judges have less time to devote on non frivolous ones).

The recognition of a right to counsel for indigent parties and then its categorical attribution to the criminal defendant, and to the criminal defendant only, exposes this problem. Notice that, assuming a merely *formal* understanding of equality in procedural law, it should make little sense to think that such exclusive recognition actually *closes* the floodgates in the civil domain. What it means, rather, is that indigent parties (*as opposed to* wealthier ones, who can pay for their own lawyers and can thus choose to sue others as they please) cannot waste public resources in frivolous civil litigation. But to support this is unreasonable: why should indigent parties be persuaded to forego a social program that

could benefit them, on the grounds that they would then be predicted to behave like wealthier parties *already* do, exacerbating the bad consequences that such behavior *already* produces?

What we need, then, in order to justify the recognition of a right to counsel and then reasonably decide on its proper scope, is a *sufficientarian* understanding of what equality demands in procedural law. That is, a conception of equality in procedural law that could allow one to say, ‘Governments are under a duty to provide to all potential parties to legal proceedings a threshold level of actual opportunities to litigate, and litigate effectively, their claims. We should determine such level by considering, also, the probable consequences of granting such level to all potential parties to legal proceedings. Beyond such level, Governments are under no obligation to protect or support people’s actual opportunities to litigate their claims and they should organize legal institutions and proceedings as to assure that no one is authorized to waste public resources in frivolous claims’.

3. The point of a categorical right to counsel for the criminal defendant

To begin with an argument on why the right to counsel is generally justified and then restrict its categorical recognition to the criminal defendant only, on the grounds that in the civil domain ‘false positive’ allocations of the right are bound to be much more frequent, does not help one to make sense of the practical relevance of the distinction between criminal and civil cases, then. ‘False positive’ allocations of rights – cases in which the right-holder exploits its status as such to reap off unfair advantages from others – are possible (and possibly frequent) across the whole spectrum of procedural law (i.e.,

cases in which a party exercises a procedural right he has while believing, correctly, that his underlying substantive claim has little merit, and in order to merely postpone a decision that he predicts to be unfavorable). Since exercise of procedural rights is typically costly for the right holder himself, a merely formal understanding of equality legitimizes the exploitation of public resources by wealthier parties. So the risk of ‘false positive’ allocations is no argument against the recognition of the right to counsel to the indigent party to a civil proceeding. Rather, a reasonable theory of equal access to justice should produce an argument on why the threshold level of publicly supported and protected real opportunities to litigate should, or should not, include a right to counsel.

So, let us construct then an argument that is specific to the criminal domain, and could thus justify the recognition of a categorical right to counsel to the criminal defendant and then let us see whether one could extend its rationale to the civil domain. In this way, we can get a firmer grasp on the practical relevance of the distinction between criminal and civil cases, with respect to the attribution of an important right in the field of access to justice.

Consider this four-pronged formulation of the objectives of criminal law: Criminal law should (1) protect people from wrongful harms by others, (2) assure that punishment follows an offense and is inflicted to the offender; while at the same time, criminal justice should guarantee that punishment (3) can only follow from a fair adjudication, leaving ample room to contestation and dissent, and (4) is directed against the least number of people and doing the least harm as it is possible, compatible with the realization of the other objectives. These are meant to count as the objectives of both substantive criminal law, as well as criminal procedure, with the former giving the

concrete content of each of such objectives, and the latter assigning priorities among (or balancing) them.

Now, this is an admittedly very general formulation, as it includes all the objectives that are standardly associated with the criminal law – the first two give a nod to deterrence, both special and general, incapacitation and, possibly, retribution; the third gives a nod to proportionality, general deterrence and rehabilitation, while the fourth recognizes a right to a fair trial – and it does so without assigning a specific weight to each one of them. So, one would need to specify much else for it to be operative in any practical way. In particular, one would need to say much more about the concrete relation between the third and fourth objectives and the first two, and, thus, about the compatibility requirement that the latter impose on the former. But, for the purposes of the argument that is about to follow, generality is a virtue not a vice, since if we can justify the recognition of a right to counsel in light of such general formulation, then the right to counsel could be justified by appealing to very different (and conflicting) theories of criminal law.

In fact, the guarantee of an effective defense through the provision of counsel to the indigent criminal defendant makes a lot of sense within such framework. Consider Justice Black's (who delivered the opinion of the Court) vote in *Gideon*, the landmark US Supreme Court case that first recognized a categorical right to counsel to the criminal defendant as a constitutional requirement.³ After having reviewed a long series of conflicting (but, in Black's judgment, actually converging) precedent decisions, Black delivered his famous line: "[...R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire

³ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). See, for a fuller account, chapter 12.

a lawyer, cannot be assured a fair trial unless counsel is provided for him”.⁴ “This seems to us”, Black concluded, “to be an obvious truth”. But how so, and why?

At base, Black had two overlapping arguments. First, he noticed, “lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society”. “Similarly”, he then added, “there are few defendants charged with crime, few indeed, who fail to hire the best lawyers to prepare and present their defenses”. But this means, Black inferred, that there is at least a “widespread belief” that lawyers are “necessities, not luxuries” in criminal courts. So, the ‘public’s interest in an orderly society’ wants its own prosecuting lawyer, just as much as the wealthy defendant wants his own lawyer; it should be only fair then that the indigent defendant wanted his own lawyer as well.

Second, Black, relying on Justice Sutherland’s careful argument in *Powell* (of which more later), observed that *without* a right to be heard *by counsel*, the rules of criminal law and criminal procedure would lose much of their point and purpose.⁵ “Even the intelligent and educated layman”, Sutherland had noted thirty years earlier, “has small and sometimes no skill in the science of law”: “[...] Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, [...] without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence”.⁶

So, it is not just basic reciprocity, but rather concrete practical commitment to the general objectives of criminal justice which suggests the recognition of a right to counsel to the indigent criminal defendant: Without the latter, in a system which makes abundant

⁴ *Id* at 344.

⁵ See *Powell v. Alabama*, 287 U.S. 45 (1932).

⁶ *Id* at 45.

use of lawyers to work, there can be no hope that the general rules that govern how decision making should proceed are actually followed, and followed in a way that is congenial, for them, to realize their own purpose. If we punish one, who has been wrongly accused of a crime, we lose, first and directly, special deterrence – the guilty person is still off the hook. We also illegitimately coerce the innocent. And, if this is a systematic, or otherwise regular mistake (*and* the general public knows about it), we lose general deterrence as well.

And yet there is still something more, which is only alluded to in Justice Sutherland's vote, and which disappears in *Gideon*, but that can be easily brought to light by joining Sutherland's arguments with the facts that he was arguing about.

Recall the facts in *Powell*: In March 1931 a group of African American males is travelling on a freight train on its way to Alabama. The group enters into a fight with a group of white passengers who, believing that the train was for 'whites only', unsuccessfully try to force them out, and are eventually forced out of the train instead. The white passengers then report to a local sheriff, who quickly organizes a search party, that they have been attacked. The group of African Americans on the train is eventually found in Paint Rock, Alabama, where the white passengers' initial accusations are joined with a charge of rape, allegedly carried out against two white women, who were also travelling on the same train.

The two white women and the African American males found in the train are then brought to Scottsboro, Alabama, where a large and excited crowd is already waiting for them. The group is then quickly tried for rape, convicted and sentenced to death.

In late 1932, the case eventually reached the US Supreme Court, which, with a 7-2 majority, reversed the conviction and sent the case back for a re-trial, arguing that the right to retain, and be represented by, a lawyer was a necessary requisite for a fair trial. As far as jurisprudential developments of the right to counsel go, the *Powell* court effectively paved the way for the decision in *Gideon*, by carefully (but still quite hesitantly) extending the scope of the 6th Amendment right to *retain* one's lawyer to include a right to an *effective* defense, and by connecting its analysis of the criminal procedure provisions of the US Bill of Rights with violations of the 14th Amendment of the US Constitution (and thus, authorizing its own intervention on the conduct of states as well).

Justice Sutherland's majority opinion famously centered on the 'illiteracy' and 'ignorance' of the defendants, repeatedly stressing the fact that the accused were 'youthful' and referred to in the record as 'boys', and that all came from another state, and had no friends. So, given their 'illiteracy' and 'ignorance', Sutherland's argument runs, the denial of appointing counsel, and of conceding adequate time for preparing an effective defense, constituted a violation of their right to a fair trial:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.⁷

Now, as we have already seen, Sutherland's final punch line does seem to then retreat somewhat, even questioning the relevance of the defendants' 'ignorance' and 'illiteracy'

⁷ *Ibid.* at 46.

altogether (recall when he writes that “Even the intelligent and educated layman has small and sometimes no skill in the science of law”).

And yet we should recognize that there is something more, and much more general, that Sutherland might be telling us between the lines. He begins by timidly (and somewhat incoherently) writing that

It does not sufficiently appear that the defendants were seriously threatened with, or that they were actually in danger of, mob violence [...]⁸

But then, he quickly adds that

[I]t does appear that the attitude of the community was one of great hostility. The sheriff thought it necessary to call for the militia to assist in safeguarding the prisoners. Chief Justice Anderson pointed out in his opinion [dissenting with the Alabama Supreme Court majority which re-affirmed the convictions] that every step taken from the arrest and arraignment to the sentence was accompanied by the military. Soldiers took the defendants to Gadsden for safekeeping, brought them back to Scottsboro for arraignment, returned them to Gadsden for safekeeping while awaiting trial, escorted them to Scottsboro for trial a few days later, and guarded the courthouse and grounds at every stage of the proceedings.⁹

So, Sutherland notes,

It is perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile and excited public sentiment. During the entire time, the defendants were closely confined or were under military guard.¹⁰

Thus, he concludes that:

It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.¹¹

⁸ *Ibid.* at 47.

⁹ *Ibid.* at 48.

¹⁰ *Ibid.*

¹¹ *Ibid.*

Sutherland's crucial and all-important point here is in observing the tension between, what he calls, one of the 'grave evils of our time' (namely, the 'great and inexcusable delay in the enforcement of our criminal law'), and the need to guarantee that a defendant is not stripped of his right to a fair trial. Such tension, Sutherland seems to think, marks the difference between proceeding promptly 'in the calm spirit of regulated justice' and going forward 'with the haste of the mob'. But this has nothing to do with the 'illiteracy' and 'ignorance' of the defendants, and yet it has everything to do with the recognition of a categorical right to counsel.¹² That is, seen in this light, it is a very good idea to demand the latter in the context of a larger social strategy, conscientiously aimed at assuring that, in a conviction frenzy, stirred by the public anger of a powerful group (i.e., white males in the southern states during the 1930s), public authorities do *not* target vulnerable groups, by exploiting their difficulties in availing themselves of an effective defense. To put it differently, the recognition of a categorical right to counsel to the criminal defendant should be then seen as part and parcel of a larger social strategy aimed at, on the one hand, transforming public anger at particularly harmful crimes (i.e., rapes) in a reasoned dedication to impartial justice; and, on the other, aimed at assuring that public anger at crime is not used as an excuse for the criminalization of vulnerable minorities.

¹² Sutherland's insistence on the petitioners' 'ignorance', 'illiteracy', and 'youth' should tell us something else as well, which is of especially great value, I would submit, for the access to justice scholar: the tendency of powerful people (i.e., a US Supreme Court justice) to ridicule, or even insult, or in any case underestimate, less powerful people (a group of black teenagers on a freight train travelling through the southern states in the 1930s) *even when* the powerful person is very attentive in construing a well meaning argument which could empower the former, going as far as to condition the argumentative work of his well meaning argument to such ridicule, insult, or underestimation. On a more uplifting note, I should note, even if only in passing, that the case involved one of the oddest (but clearly extremely effective and evidently empowering) coalitions in the history of American social and political movements, which included a Romanian born, Jewish, Democrat, elite lawyer from the Lower East Side in New York City, Samuel Leibowitz, and the Communist Party USA – all travelling through the southern states in order to defend a group of black teenagers from the risk of death at the hands of the state.

Notice that, when we understand Sutherland's reasoning within such larger social strategy, one apparent paradox of his argument (namely, the fact that he begins by giving material relevance to the defendants' 'special circumstances', but ends up denying that 'special circumstances' matter at all, when he says that even an educated man has no particular skill in the 'science of the law'), and which the *Gideon* court exploited in order to extend Sutherland's conclusions, quickly begins to wane (although, of course, if we do this, we end up in an even larger contradiction, as Sutherland's holding – no categorical right to counsel, but only one conditioned to the existence of some 'special circumstances' in the given case – simply ceases to follow from the argument). We are worried, indeed, about 'special circumstances' whenever we reason on the desirability of representation at trial, because it is the existence of such 'special circumstances' which makes it possible, for public authorities, to target vulnerable groups whenever it is in their interests to do so. But this much advises to operate *ex-ante* (and recognize, that is, a categorical right to counsel to *any* defendant), rather than *ex-post* (and provide counsel when such 'special circumstances' apply in a given case), and organize things in a way in which public authorities do *not* expect to be able to exploit the existence of such 'special circumstances' to their own contingent advantage. The observation on the limited capacities of the 'educated man' in the science of the law, then, *further* suggests that it is, all in all, a very tough exercise to determine *ex-post* when and how such 'special circumstances' will indeed apply in a given case – we are, roughly, all on the same boat, when we are individually singled out and pitied against an angry mob, and the vulnerabilities of any individual belonging to any group can easily transfer to any individual belonging to any other group.

4. How much is enough? When the right reasons for distinguishing are also good reasons for blurring the distinction itself.

So far we have seen that the recognition of a categorical right to counsel to the criminal defendant can be explained and justified both within a general formulation of the fundamental objectives of criminal justice, as well as within a larger social strategy that, in pursuance of such objectives, is directed at the protection of vulnerable minorities against majoritarian aggressions motivated by excited public sentiments, such as anger and fear against crime.

The relevant question now is then to determine how far this logic can be extended, and which limits it should impose on Governments' commitments, both, internally, within the criminal domain, as well as beyond the latter to the civil domain. If the logic for granting a categorical right to legal counsel could be so extended, beyond the narrow confines of the criminal domain, we could have an argument that calls for a unified treatment of the correct interpretation of the demands of equal access to justice, transcending the distinction between the criminal and civil domain.

We have seen already that one common rationale for distinguishing between the civil and the criminal domain lies in the difference in posture between the criminal defendant and the civil plaintiff with respect to the power to activate the relevant proceeding. In the case of the criminal defendant, the power to activate the trial, which he participates in, rests (at least in contemporary legal systems) with public authorities; whereas in the case of the civil plaintiff, the power to initiate the trial rests with a private actor (the plaintiff itself).

Let us begin then by pointing out that even though the activation of criminal proceedings might not *formally* involve the activities of private citizens, the need for choosing and prioritizing among competing cases (even when actual choice is hidden behind a formal duty to pursue all cases) typically exposes public agents to social pressures of various kinds and which might go well beyond what formal substantive laws actually require. So, even under the first minimal understanding of the point of equal access to justice that has been discussed (equal access to justice as equal legal protection), any reasonable approach to access to justice should be able to track how and for which purposes such social pressures are or could be used, as they increase or decrease the prospects of legally protecting one class of rights or goods.

In fact, even though victims of crimes typically play only a limited role in the formal activation of criminal proceedings against their aggressors, the determination of the appropriate scope and effectiveness of their participation raises difficult questions and important concerns, ranging from the reinforcement, or ‘doubling’, of stigma for social deviants, the bureaucratization of judicial functions, to the use of public procedures as channels for the ordered expression of private and public anger, or, rather, the transformation of the latter in a passionate, and shared, sense for justice.

For example, access to justice scholars have long begun to integrate the insights coming from Erving Goffman’s labeling theory, within their analysis of court-experiences.¹³ Goffman famously proposed to describe deviance by focusing on the audience, which labels the conduct as deviant, rather than, directly, on the conduct, or the

¹³ See, for example, KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988), citing ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963); for a review, see S. Silbey, *After Legal Consciousness*, 1 *ANNU. REV. LAW. SOC. SCI.* 323 (2005), esp. at 339.

actor itself, which has being labeled as deviant. Shifting one's attention from the characteristics of the marginalized to the perception of the labeling audience lets one see that victims of a crime, and who are targeted as a specific, and socially labeled, group, bear the very serious risk of being *doubly* stigmatized.¹⁴ First, as a national, racial, ethnic or sexual minority directly targeted by aggressive and abusive conduct by others. Second, as someone who has to tell, show, explain, or justify her 'problem' to several different audiences, ask for their cooperation, and demand redress. For example, a victim of sexual abuse might have to undergo physical examinations, repeated interviews with public officials, testimony at trial, and so on. Also, she might have to explain to her colleagues, or boss, or clients, for example, changes in her appearance, reassure them about her physical conditions or even justify why she needs to take days off her work. Whereas for the former stigmatization one is well advised to look at what criminal law and procedure prescribes, how it actually determines the behavior of officials, and how effectively it deters aggressive behavior; for the latter kind of stigmatization, one is well advised to look at work regulations and practices, and at how these affect, in turns, one's real opportunities to claim the protection of the law.

All of this suggests that repression of harmful conduct through criminal law should be integrated with public support to vulnerable parties in the civil domain as well. A battered woman who finds obstacles (monetary or otherwise) in activating court-proceedings to obtain a divorce (when the former are required to get the latter), or to get a fair deal out of a separation, is exposed to higher risks of yet more violence or other types of harms from her husband. Guaranteeing that she can effectively file for divorce, if she chooses to do so, might do very little with respect to what has *already* happened

(punishing or deterring the husband is not, after all, the point of divorce proceedings), but might prevent future harms without resorting to criminal repression.

Consider now an undocumented immigrant, working a low-wage job (below the legally mandated minimum wage) that she found through the owner of the room she is renting – a violent and exploitative relative. A problem in each of these distinct areas (immigration status, work regulations, housing, and domestic violence) might be independently recognized by specific laws and, depending on the highly *contextual* features of her actual story, she might appear as a defendant, or alternatively as a plaintiff, or as a witness, in a criminal or civil court. Notice also that, strictly speaking, she doesn't need to invoke the State's judicial machinery in order to resolve anyone of her 'legal' problems: she can ask her boss to pay her more, her landlord to refurbish the room, or to stop harassing her – and, if they are kind and benevolent enough, they may comply with her requests; or, she could simply leave the country and be done with all the injustices she is suffering. Furthermore, the specific *legal* outcome of each of such cases will probably *not* depend on the resolution of the *other* cases she finds herself implicated in. And yet, from the point of view of the deprivations that *she* experiences, all such 'legal problems' are obviously connected (consider: she cannot file a complaint against her exploitative boss for fear of deportation, nor can she file a complaint for the conditions of her room for fear of retaliation by her boss. On the other hand, a better salary would allow her to find a better place to live in, or, at least, pay for a lawyer to help her to legalize her status in the country), blurring the lines between a distinctive criminal part, or a distinctive civil one, as well as between the claims that she could initiate or those that would see her as a mere defendant.

But this means that a reasonable approach to access to justice should be able to offer an integrated view of the actual opportunities of legal protection of valuable goods and rights in the criminal domain, alongside a precise understanding of the opportunities and costs of effective activation of court proceedings in the civil domain, when these latter can, at least in part, be used by vulnerable parties as functional equivalents of criminal repression.

5. A brief restatement and summary

Let us now recapitulate, by making the argumentative role of the three interpretations of equal access to justice explicit; and then let us draw a few general lessons from the arguments we have presented so far.

We began with the first interpretation; that is, the ideal of equal protection. And we have noticed that it apparently provides a weighty reason for the recognition of significant public commitments in the administration of justice. The amount of law one should be able to get, should not be a function of one's ability to pay for it: one's wealth should not be a factor in determining the desired correspondence between the rules as announced and the rules as applied. Public intervention should thus be designed to assure that it is not. Whenever private attorneys are deemed necessary for the operation of justice, public authorities ought to be committed to provide one to those who cannot pay for it.

We have also noticed, however, that there is a relevant difference in posture between civil cases and criminal ones. In the paradigm scenario, the activation of criminal cases depends on public authorities, in a way that the activation of civil cases

does not. Public investments in civil cases are, at best, more troublesome, because their amount depends on the strategic choices of private individuals. Thus, financing them (by financing one of its biggest costs, lawyers) bears the risk of bankrupting the public purse, depending on the strategic choices of private individuals.

The second and third interpretations (the ideal of equal standing, and the ideal of agency in legal affairs respectively) help us explain why this should be so. It is tempting to see the criminal trial as an enforcement mechanism: there is a victim, there is an accused, and there is the State, and we want to make sure that conditions are met for the correct and timely enforcement of substantive criminal law. The parties' interests are not symmetrical, or not perfectly so anyways (the victim and the State's interest is not that *any* accused goes to jail, or is otherwise punished, but that the guilty one does, eventually). This is why we, as a public, should invest large sums of money in public prosecutors (this is, most directly, the work of the first interpretation – the ideal of legal protection), as well as in the provision of counsel to all the accused who cannot afford one (this is the joint work of the first and third interpretations).

Conversely, it is tempting to see civil cases as involving parties who have opposed and symmetrical interests, are locked in a zero-sum game (whatever you win, I lose, and vice versa, and there are no spill-overs to other parties, present or future), and choose *whether* and *when* to go to litigate against each other, and *what* to litigate about. So, what is paramount here is not the ideal of legal protection, but rather, the ideal of equal standing and the ideal of agency in legal affairs. Surely, even in civil cases we might be interested in assuring a correspondence between the 'rules as announced' and the 'rules as applied', and surely many parties might wish to pay *less* than they do now to

effectively vindicate their claims in civil courts (and would much prefer to have public authorities to step in and pay their bills), but the difficulties we have in designing a system to deliver relief from high costs when relief is needed is *not* the product of capricious institutional design. Rather, it is part and parcel of what we take civil cases to do. Civil cases are *just* the result of strategic interactions of two symmetrically-positioned parties, and we should not want public authorities to intrude in such interactions because we should not want the former to end up bankrupting the whole system. All we should be interested in is to recognize formal standing to any aggrieved party, and then to guarantee that the institutional mechanism, which is designed to manage the dispute at hand, protects both parties' agency to cultivate their respective claims as they see fit.

The argument does not work, as we have seen. At least one possible reading of ideal of equal protection (centered on what judges use as a basis for their decision) doesn't commit us to a categorical recognition of the right to counsel, even in the criminal law. Whereas at least one possible reading of the ideal of agency in legal affairs supports unreasonable interpretations of procedural rules, as well as of the limits that the latter should impose on parties' choices and litigation strategies.

What I should like to show now, is that the second interpretation (the ideal of equal standing in open court) both helps us to explain why it *shouldn't* work, and what we are still missing, in order to have a more reasonable grasp of the practical relevance of the distinction between criminal and civil cases, with respect to the attribution of procedural rights and guarantees.

The argument shouldn't work because, oddly, it unreasonably downplays the magnitude of the costs, associated with civil trials. The protection of agency in civil cases

is *not* costless. And we are interested in these costs because we are interested in the effects of their distribution on people's social standing, with respect to each other and the State. Whose and which claims, we should ask, get the most attention, visibility and leverage on public resources, and why? This is not standing, in its technical and formal sense, however. Rather, it refers to the specific social relations one is able to enter into, as one attempts to participate in claim-making, or is forced into participating by the claims of others; and it refers to the effects of these social relations on the degree of one's power within adjudicative procedures.

The second argument on the recognition of a categorical right to counsel, which we have studied, helps us to illustrate these practical points in a sharper way. We began the argument by listing the general objectives of the criminal law, both substantive and procedural. Then, we noticed that it is, first, a genuine commitment to these goals, which shall justify the recognition of a categorical right to counsel in the criminal domain. This is *Gideon*: it simply makes no sense to say that the State should commit itself to the realization of this or that goal in the criminal domain, design an expansive institutional apparatus, which heavily relies on lawyers to operate, in pursuance of such goals; *and then*, make access to such institutional apparatus depend on one's ability to pay for a private lawyer. If we punish one, who has been wrongly accused of a crime, we lose, first and directly, special deterrence – the guilty person is still off the hook. We also illegitimately coerce the innocent. And, if this is a systematic, or otherwise regular mistake (*and* the general public knows about it), we lose general deterrence as well.

But the *Powell* court, I argued, told us something more, even if only implicitly: we should commit to, this is the reading I proposed of Justice Sutherland's argument,

recognize a categorical right to counsel in the criminal domain (and condemn as illegitimate any criminal trial, in which one has been found guilty, without having had a real opportunity to be assisted by counsel), because we are well advised to anticipate the probable (and rational, in a minimal sense) response of public authorities whenever they are pressured to act by powerful social groups, and make sure that that we can force them out of the quick and easy alternative of deliberately targeting comparatively more vulnerable groups for pointless retribution and harassment – we should commit, that is, to the protection of equal social standing, within processes of claim-making.

And it is *this* interpretation of *Powell*, which motivates our interest in access to justice even in the civil domain, and correspondingly expands our public commitments in the latter. Actual power over judicial processes, and the corresponding ability to reap benefits off their activation and management, this was the crucial observation, depends on a significant variety of different agencies, and requires the coordination of very different actors, *both* in the criminal and the civil domain: in order to determine when, and how, and for which purposes exactly, a private counsel is useful (or necessary) for one's claims to be granted equal social standing, we often need a comprehensive, and integrated, assessment of the work and activities of these different agencies and actors.

Notice that this interpretation of *Powell* should not, in it and of itself, justify a categorical right to counsel in the civil domain as well. What it is meant to do is, rather, to illustrate that even when we begin with a minimal definition of the goals of public authorities and legal orders (tied to the goals of criminal law and procedure), we are forced to integrate our analysis of public commitments within a much larger system of institutions and procedures. Even when we begin with a narrow view of public goals and

commitments in one domain, we are often forced to look well beyond the procedures specifically designed to realize such goals. What makes one vulnerable in one procedural domain, often depends on one's vulnerabilities in other domains. Correspondingly, as the recognized goals of public authorities and legal orders grow, our reasoned commitments in equal access to justice should grow as well.

So, what do we need then, if we want to explain and justify this (counter-historical) move from *Gideon* to *Powell*, and then extend it within a more general theory of public commitments in access to justice?

We need a solid and coherent set of conceptual tools, with which we should be able to 1) gear the evaluation of procedural devices to the kinds of substantive outcomes that we should strive for; that is, our theory of access to justice should be tied up with a more general theory of social justice. It is only when we fill the goals of procedural devices with substantive content, that we can reasonably evaluate the scope of public commitments in procedural law (both criminal *and* civil).

Also, we should be able to 2) comment on and identify the varieties of costs, which the activation and use of any procedural device tends to produce, and how these are distributed in turn; that is, we should be able to comment on and identify the burdens of using law, as a tool for claim-making. And, relatedly, we should be able to 3) connect the analysis of these costs, with the analysis of the substantive goals of legality and specify how, and to which extent, the latter might justify the imposition of the former. It is only when we have a clear grasp of 2) and 3), that we can reasonably evaluate ways of limiting wasteful uses of procedural resources, which harm the prospects of effective

application of substantial laws, and, consequently, of equal social standing in claim-making.

Finally, we should be able to 4) evaluate forms of agencies and meaningful participation in the legal process, even in cases in which the relevant being does *not* control all the procedural levers, which are relevant for producing valuable outcomes. Procedural outcomes are the result of the interaction of different institutions and agencies: having effective power over their operation means to cooperatively integrate one's actions within diverse and plural settings, both within and beyond formal proceedings.

4. THE RIGHT OF SELF-REPRESENTATION:

UNFETTERED DISCRETION AND ACCESS TO JUSTICE

1. Introduction

One way to illustrate the limits of an interpretation of access to justice, grounded upon a strong interpretation of the ideal of agency in legal affairs (understood as unfettered discretion to control one's litigation choices) is to study the case of the right of self representation at trial, and its relation with access to justice. The conflation of agency in legal affairs (understood as unfettered discretion in one's litigation choices) with access to justice implies the conflation, as well, of the right to self-representation (understood as a key component of one's unfettered discretion over litigation choices) with access to justice. If access to justice means nothing but unfettered discretion and control over the litigation process by each of its participants, then equality in access to justice *must* necessarily include a right to self-representation. The decision to instruct or even consult a counsel, or to proceed on one's own, intuitively appears as having much to do with the degree of one's control over the litigation process itself. On the contrary, if we can show that a right to self-representation is not an essential component of equal access to justice, we would show, also, that 'unfettered discretion over litigation choices' is not an essential component of equal access to justice either.

2. Self-representation and access to justice in the common law: the criminal defendant

Most common law jurisdictions recognize, as a matter of course, a right to self-representation.¹ As one recent comparative study of the right to self-representation concluded (referring especially to English courts) “The idea that the litigant stands at the core of litigation and is free to decide whether to act in person or through counsel has remained impregnable throughout a long and dynamic history of change in almost every aspect of civil procedure”²; “These assumptions have gone unchallenged because a right

¹ See RABEEA ASSY, *INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION* (2015). This essay critically reviews several arguments, which purportedly justify a broad, and categorical right of self-representation (both in the criminal, as well as in the civil domains), and finds (correctly, in my view), that none of them should persuade one of the desirability of a right of self-representation. Three of these arguments in particular stand out: 1) There is a right to self-representation because its recognition as a fundamental right enjoys a long (and little contested) tradition, which symbolically contributes to an iconic model of legitimate procedure; 2) There is a right to self-representation because its recognition fits within an interpretation of procedural rights as personal and discretionary privileges, which guard against third-parties intrusions; 3) There is a right to self-representation because it protects one against the misfortune of not being able to find (and pay) a competent lawyer. This section deals directly with 2) and 3) only. There are, it seems to me, only two big things, which are missing, in Assy’s analysis. For one thing, Assy merely distinguishes between, broadly, civil law/inquisitorial and common law/adversarial systems of procedural law, but doesn’t consider two other overlapping (but not exactly corresponding) distinctions between procedural systems, which admit the testimony of the parties, and procedural systems which do not, and procedural models organized around the principle of orality, and procedural models organized around written proceedings. Considering these further distinctions gives an even more nuanced historical understanding of why *some* procedural systems (and not others) have recognized a right of self-representation, by including relevant observations of procedural systems which have granted opportunities of self-representation, by opting out (either generally, or in specific contexts) of mandatory representation at trial (as many civil law jurisdictions, which began to admit the testimony of parties, *at the same time* abolished mandatory representation, and moved away from a procedural model based on written proceedings, and toward one based on the principle of orality, centered on a public hearing; for the classic comparative treatment of party testimony, see MAURO CAPPELLETTI, *LA TESTIMONIANZA DELLA PARTE NEL SISTEMA DELL’ORALITÀ* (1964)). My own personal guess is that such an historical account could grant one a nuanced perspective on the arguments based on both 2) and 3) above, which could qualify their relevance and importance, without committing one to endorse a broad and categorical recognition of a right of self-representation. Indeed, this is the kind of strategy, which is advised in this section. Second, Assy doesn’t consider the possible connections between arguments on the right to self-representation and arguments on collective or group litigation. Many civil law jurisdictions reject the introduction of collective or group litigation on grounds, which are strikingly similar to 1) and 2) above. Conversely, the class action device is a well-established mechanism for group litigation in the US, even if the right to self-representation clearly enjoys a rather respectable and widely accepted tradition of recognition and justification.

² R. Assy, *Revisiting the right of self-representation in civil proceedings*, 30 C.J.Q. 267 (2011), at 273.

to self-representation has been perceived as a natural expression of the right of access to courts”.³

And yet the conflation of the right to self-representation with *equal* access to justice is unattractive, at the very least – thus making the conflation of agency in legal affairs with equal access to justice unattractive as well.

The unskilled, *pro-se*, defendant (or plaintiff) has (or might have) a lower chance of prevailing at trial. Of course, if, and to the extent that, we value the protection of unfettered discretion over one’s litigation choices above all else in legal proceedings, these costs, which the *pro-se* litigant imposes on him or herself, should not worry us very much. But the *pro-se* litigant imposes costs not only on him or herself, but on others as well: the unskilled litigant might require more guidance from public officials, or the repetition of otherwise routine activities, thus increasing the public costs of the proceeding he or she is a party of. So the relevant normative question then should be to determine *when* the imposition of such costs, by one party, to all other parties (both actual and potential), is legitimate.

To begin, let us consider this classic case (and the underlying rationale which purportedly justifies the recognition of a right to self-representation to the criminal defendant), which is mentioned in *Faretta v. California*:⁴

In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and Judicial character,

³ *Ibid.*, at 268.

⁴ 402 US 806 (1975). This is the landmark US Supreme Court decision, which held that the US Constitution guarantees that “a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so”.

and characteristically departed from common law traditions. For those reasons, and because it specialized in trying “political” offenses, the Star Chamber has, for centuries, symbolized disregard of basic individual rights. *The Star Chamber not merely allowed, but required, defendants to have counsel. The defendant's answer to an indictment was not accepted unless it was signed by counsel. When counsel refused to sign the answer, for whatever reason, the defendant was considered to have confessed.* [emphasis added].

So, the right of self-representation is a safeguard against threats to individual freedom, here, because it constitutes a relevant obstacle to the abuse of state power through the criminal process. By imposing legal representation, that ‘curious institutions’ called the Star Chamber could exploit the special vulnerabilities of defendants in securing effective assistance by their counsels: parties, apparently, retained no control (not even *formal* control) on the activities of their lawyers (the quite simple line, ‘if you do not sign my answer to this indictment, I shall fire you’, was clearly not available to defendants at the Star Chamber), who had instead the concrete power of making their client sign whatever they wished (‘if you don’t write the answer I like, I will not sign it, and you will be found guilty’ – this is the line which counsels had all the incentives to deliver, anytime they had even a slight personal interest in the outcome of the case).

Thus, we should be willing to tolerate the costs, which self-representation imposes on all other parties to judicial proceedings, as long as, for example, there is *no* market for legal services, or we do *not* trust the market of legal services to provide effective choice to its users, and independent and reliable performance by its providers. In either case, self representation might very well constitute an all important barrier to the abuse of state power by assuring that at least *some* defense is afforded (or could be afforded) to anyone.

3...and the civil plaintiff

But what about the civil plaintiff then? There is no state threatening to intrude on anyone's liberties here, so the benefits, which the right to self-representation provides, might not compensate the costs which *pro se* litigants typically impose on everyone else. And yet notice that the two conditions which advise the recognition of the right to self representation in the criminal context tell us something which is of great value even for the civil plaintiff. *If* there is no market for lawyers or legal services generally (admittedly, this condition is fulfilled, as there is a market for lawyers in most countries, today) or such market does *not* provide effective choice to *all* its 'consumers' (this condition is hardly fulfilled instead, by most legal systems) and independent and reliable performance by its providers (this condition is, of course, empirically difficult, but not impossible, to verify, for most countries and legal systems – and it was certainly not fulfilled at the times of the Star Chamber), then self representation works, here just as much as in the criminal context, to protect equality in access to justice: its denial would clearly condition the protection of one's rights to some features, which relate with the contingent position of the claim maker (is she a member of a socially identifiable, and discriminated, minority, which has traditionally found it difficult to procure for itself the services of elite lawyers? Are lawyers generally all that competent, after all, quite apart from technical procedural matters, on the substantive issues involved? Is it lucrative, or contrariwise imprudent or reputationally dangerous, for them, to get involved with 'such kind' of client?), and yet which are irrelevant from the point of view of substantive law.

Needless to say, this analysis calls for complex and informationally demanding evaluations as it advises interpreters to evaluate the costs, which *pro se* litigants might

impose on the administration of justice as a whole, and then compare these with the costs, which the current structure of the delivery of legal services in any given country imposes on litigants generally. The point that one should take home from all this, however, is more simple and straightforward, and directly relates with the argument which I have been discussing: we should not conflate the right of self representation with equal access to justice generally because we should not conflate the idea of agency in legal affairs with access to justice either.

To see this, notice what the proposed analysis for the allocation of the right to self representation points us to look at. We should begin by observing the concrete abilities of *pro se* litigants and compare them with the concrete abilities of those litigants who choose instead to be assisted by counsel. Then, we should evaluate the amount of public effort and costs, which might be expected if we were to try and raise the abilities of *pro-se* litigants to the level of those with counsel and compare these with the amount of public effort and costs which might be expected if we were to guarantee, to each and every party (actual and potential) to any legal proceeding, effective choice over one's counsel, and reliable and independent performance by the former.

This is *not* just an analysis of agency in legal affairs, granting unfettered discretion over one's litigation choices. Rather, the analysis directs us to 1) investigate the conditions, which determine one's ability to transform formal opportunities to participate in judicial proceedings, in concrete realizations and achievements, once such opportunities are actually exercised; and 2) specify the acceptable standard, or threshold, of the level of the concrete abilities of each and every litigant, the failure of meeting which should trigger public obligations to intervene.

5. ON THE MARKET MECHANISM AND EQUAL ACCESS TO JUSTICE

1. Introduction

So far we have discussed three interpretations of equal access to justice (the ideal of, respectively, equal legal protection, equal standing in open court, and the ideal of agency in human affairs), one practical distinction (the distinction between criminal and civil cases) and the logic for attributing a right to self-representation.

Implicitly, the discussion prefigured a central role for public institutions generally. Each of the received arguments, which we began to study, deals directly with one public institution or another – it simply isn't possible to understand either one these interpretations, or the point of distinguishing between criminal and civil proceedings, without reference to a host of public institutions, like states, or courts, as well as the many other public institutions which govern the coercive enforcement of laws and other regulations. But there are a host of other social institutions, which are at least one step removed from these public institutions, and which appear to be centrally involved in access to justice nonetheless – namely, competitive markets in the exchange and production of goods and services in the relevant jurisdiction.

So, shall we rely on markets to deliver equal access to justice for all? This chapter and the next two take up this question and propose a tentative theoretical framework to address its challenges.

At first sight, this might look like a very odd question. Indeed, at first blush at least, it does seem very reasonable to be fairly skeptical about the virtues of markets in access to justice. Consider the following two arguments, which track very common

intuitions in the field. First, one could argue, it is markets which rely, and heavily so, on access to justice, and *not* the other way around. Indeed, it is very hard to even imagine what it could mean for one market or another to allocate anything at all, *without* something like access to justice (and something like equal access to justice too).

“Markets require defined and protected property rights”¹ and fair ones require fairness in adjudicating these defined and protected property rights. Notice that this is *not* (or at least it is not typically) an empirical argument, but a ‘conceptual’ or ‘analytical’ one. There are empirical presuppositions involved to be sure (more on them later on in next chapters), but the main thought is, more radically, that “a fair method of dispute resolution is [...] analytically prior to a fair market”.² And, this is where the argument begins to bite, “if a just legal framework is required for a market to operate properly, we need principles independent of a market system to determine the just arrangement of legal frameworks”.³

Consider now the standard punch line of many arguments, which support a categorical right to counsel: people should have representation at trial, provided by a professional lawyer (say, minimally, in all criminal proceedings in which one is a defendant) no matter their ability to pay for it, because the amount of representation one should be able to get at trial, should *not* be a function of one’s ability to pay for it.

¹ I take these formulations from a 2018 draft of FREDERICK WILMOT – SMITH, *EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD* (2019) (drafts on file with the author), at 35 (of the 2018). These phrases are not in the draft of 2019.

² *Ibid.*

³ *Ibid.* Which does *not* (*did* not) mean, according to Wilmot – Smith, that markets that are, invariably, illegitimate means to allocate legal resources. It means that we need, first and necessarily, to provide independent criteria in order to evaluate what a just (or fair, or good, or else) outcome in the distribution of legal resources is and, then, speculate on the instrumentalities of markets in contributing to, or hindering, the realization of such outcome. This is a very important point, although one big problem of this way of arguing for it is in moving too quickly from specifying what’s necessary for a market to ‘properly function’, to specifying what’s necessary for a market to function in *a fair way*. Later on in this chapter, I discuss a related issue by commenting upon an influential argument in economic development by Hernando de Soto.

Here we have (at least in a significant portion of modern and contemporary legal systems) a somewhat competitive market (the market for lawyers), and we argue that we cannot rely entirely on it, when we consider fair (or just, or good, or legitimate) distributions of the relevant service (representation at trial). It is all too easy to assume then, and quite understandable to expect, that *any* argument about equality in access to justice should share a similar structure, and point to some deficiencies (in terms of fairness, justice, or else) in the distributional effects of market allocations.

We shouldn't take either one of these arguments at face value, as they both have relevant ambiguities. However, they do seem track, as we shall see in this chapter and the next, two important observations in the field of access to justice. There certainly are important (and extremely complex) connections between the operation of the market mechanism in general in one society or another, and the protection of equal access to justice within the latter's jurisdiction— minimally, this means that whenever we make a practical argument in one field, we are really well advised to keep track of its effects on the other. Also, we do have very strong reasons to be very skeptical about the ability of the market mechanism *alone* to deliver acceptable distributions of one relevant good in access to justice – namely, lawyers' services.

The big problem is that the analysis (both its empirical part as well as its theoretical portion) of the connections between the operation of the market mechanism, and the protection of equal access to justice is a very tough exercise, which, at present, does not seem to deliver very many definitive practical conclusions. Similarly, even though we can be fairly confident to say that the market mechanism *alone* has

tremendous difficulties in delivering acceptable outcomes in the distribution of legal services, it is *not* clear at all *what kind* of public intervention could really help.

This chapter and the next two take up these two questions, but with little hope and no ambition to arrive at any definitive, and direct, practical advice on either one of them. This chapter sets the stage, by discussing two standard distinctions – namely, the distinction between economic and social development, and the distinction between the market understood as a set of idealized conditions of production and exchange, jointly defining the norm of perfect competition, and the market understood as a set of institutional, social, and behavioral conditions. The chapter considers a few possible theoretical arguments (which have received, however, at least some empirical probing) on the connections between the operation of the market mechanism and the protection of one foundational dimension or the other of equal access to justice, and shows the relevance of these distinctions for the access to justice scholar and practitioner. Any reasonable theory on equal access to justice, this section concludes, must then give adequate account of these distinctions, and integrate them within its conceptual vocabulary, and its recognized empirical challenges.

Chapter 6 zeroes in on one very specific market – namely, the market for lawyers – and speculates on the use and reach of the norm of perfect competition in its practical evaluation. Perfectly competitive markets in the allocation of legal services, this chapter argues, are enormously attractive, as we have reasons to trust that their dynamic effects could very well offset the harms of unequal distributions. The problem is that we also have very strong reasons to believe that the market for lawyers can hardly operate close

to the norm of perfect competition, because of the specific features of the good that it allocates (namely, law and legal services).

Chapter 7 discusses three of such features in particular: 1) use of legal services causes significant spillovers, both positive and negative (and it is *meant* to do so), and rational consumers *do* think (and think as practically relevant) that their ‘consumption-choices’ influence the costs that *other* consumers will have to endure; 2) the evaluation of legal services is plagued with evaluative uncertainties, *both* with respect to the outcome that they are designed to produce, as well as with respect to the needs, which they provide satisfaction to; 3) the market itself is fragmented and specialized, according to the activities and choices of very different users (one relevant distinction being that between corporate and individual clients), and, consequently, providers, who have significantly *different* abilities, when it comes to protecting themselves against the potential harms, and risks of 1) and 2).

The point of these three chapters is *not* to come up with any definitive practical advice on how we should structure public intervention in the field, in order to either squeeze any particular market for lawyers closer to the norm of perfect competition, or affect larger re-distributions of legal services themselves, or of the good which typically pays (at least part of) their costs (namely, wealth). Rather, these chapters try to pinpoint what it is that we should expect from any reasonable theory on equal access to justice, if it wishes to advise us on reasonable strategies for reform.

2. Economic and social development: the point of distinguishing

The first distinction we should keep in mind is a well-established and widely recognized one: when we consider the general relation between markets and equal access to justice, we should distinguish between economic and social development. Aggregate measures of a country's, or a community's, or a geographical area's aggregate wealth are one thing. Measures of the same country's, or community's, or geographical area's *social* basis of well being are quite another. Generally speaking, arguments in equal access to justice are, first and foremost, arguments about the *dependent* variable of institutional reform and political action generally – and, as such, they attempt at identifying equal access to justice as an aspect of social development. Conversely, arguments, which use aggregate measures of economic development are, at best, arguments on the *independent* variable of institutional reform and political action, both when the relevant dependent variable is social development generally, as well as the dependent variable is equal access to justice in particular.

The general distinction relates with, and is motivated by, three further distinctions.⁴ First, we should distinguish between social and economic development

⁴ Not surprisingly, the CA (in both Sen's and Nussbaum's versions) takes this distinction to heart, in all the three senses, which this section specifies. Even more than that, all three senses of the distinction between social and economic development have appeared early on in the first formulations of the entire approach. For example, A. Sen, *Equality of What?*, in TANNER LECTURES ON HUMAN VALUES (MCMURRIN ED., 1980, criticizes Rawls' use of 'primary goods' as the preferred space for evaluating distributive fairness, by focusing on the third sense of the distinction especially (and, in the process, finding agreement with Rawls on the first two): capabilities are a comparatively better evaluative focus than primary goods, because they can account for the great variability of need and vulnerabilities, depending on one's social position, or even within one's own life-span. Furthermore, Nussbaum's own identification of what unites Sen's version of the CA and hers, heavily relies on (and explains the value of) the three senses of the distinction between social and economic development presented in the following: "[a Capabilities Approach] holds that the key question to ask, when comparing societies and assessing them for their basic decency or justice, is, 'What is each person able to do and to be?'" In other words, the approach takes *each person as an end*, asking not just about the total or average well-being but about the opportunities available to each person. It is *focused on choice and freedom*, holding that the crucial good societies should be promoting for their people is a set of opportunities, or substantial freedoms, which people then may or may not exercise in action: the choice

because we should distinguish between the means of social policies and plans and, and the latter's goals and objectives. As such, the distinction relies on a fairly simple and straightforward reasoning: it is quite hard to value wealth as a good, without considering, *also*, the various human goals and ends, which wealth itself can be used as a means to. Surely, wealth (especially in contemporary market economies) can be used to accomplish all sorts of other goals, and thus to secure a significant number of other goods or otherwise valuable things, so that it might make a lot of sense to use wealth (or variations in wealth over a specific time frame) as a general cue to estimate how well a country is actually doing (and of how productively and sensibly it uses its various resources, physical or otherwise). Relatedly, it might be very reasonable and wise to take economic development itself as an appropriate goal of social policy. But these are all *empirical* arguments, which are thus contingent on very specific social conditions to be met, and which presuppose the very conceptual distinction we are discussing (consider: if economic and social development were, indeed, the same thing, it would make no sense at all to analyze their empirical relation!) and which assume a host of value judgments

is theirs. It thus commits itself to respect for people's powers of self-definition. The approach is resolutely *pluralist about value*: it holds that the capability achievements that are central for people are different in quality, not just in quantity; that they cannot without distortion be reduced to a single numerical scale; and that a fundamental part of understanding and producing them is understanding the specific nature of each. Finally, the approach is concerned with *entrenched social injustice and inequality*, especially capability failures that are the result of discrimination or marginalization. It ascribes an urgent *task to government and public policy* – namely, to improve the quality of life for all people, as defined by their capabilities.” See MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011), at 18, 19. I discuss these three senses here, however, rather than in the chapters, which are specifically designated to the task of presenting different versions of the CA, because the reasoning which motivates the distinction can be agreed upon even by someone who is otherwise skeptical as to the *further* insights (either conceptual, descriptive, or normative) a CA can offer. Once we come to agree that the distinction between social and economic development is one which should be central in the understanding of access to justice, and its interrelations with the market mechanism in general, then we have, also, strong reasons to use and trust a systematic approach to social development (like a CA) which takes the distinction to perform a foundational role, within its own evaluative apparatus.

(whose reasonableness should thus be appraised against the background of a reasonable understanding of social development itself).

Also, we should distinguish between social and economic development because we should distinguish between monistic and pluralistic conceptions of well-being. We should express skepticism about, and concern with, arguments, which begin with observations about a country's, or community's, or geographical area's, wealth and then conclude, *sic et simpliciter*, with definitive evaluations about the well-being of the people who happen to live in such area, because we should value pluralism over monism, in both our definitions of the appropriate goals of social policy and planning, as well as in our descriptions of the goals of individual choice itself.

The reasoning here is that there are many different 'things', which people pursue and do with their lives. And empirical skepticism about our ability to find the single universal ingredient which shall 'cause' one human life to go well, or not so well, or excruciatingly bad, advises to look for qualitatively rich descriptions of the various different 'things' that we find people struggling to pursue.

Relatedly, we should distinguish between economic and social development, because we should distinguish between aggregate measures of whatever good (like wealth itself) we decide that it is reasonable to value, and measures of the same good, which account, also, for how the good itself is distributed among the relevant population. There are at the very least two strong reasons to value this distributional aspect of the distinction. For one thing, because it is, first and foremost, a conceptual mistake (as it implies confusions about the very meaning of the relevant variables) to infer anything at all about any *one* individual's level of enjoyment of a good (like wealth itself), from

aggregate measures of the level of enjoyment of the *same* good in the country, or community, or geographical area, which such individual is a member of.

Also, it is an equally bad mistake (although an empirical, or at least hybrid, and not a purely conceptual one) to infer too much about *one* individual's ability to *use* whatever good (like wealth itself) he is holding on to, and transform it in valued actions and activities. It is a somewhat contingent fact (that is, it is a fact which might change, up to a point, and it certainly does change, across societies and ages in human history) of the human animal condition that we all come in different sizes and shapes, and with different strengths, and vulnerabilities, and that these vary greatly in anyone's life span. So it is generally a very bad guess to infer what it is that one can do and be, from the amount of 'resources' one happens to be holding on to at any given moment (and from those alone). No minimally intelligent adult human being would assume (I would bet) that all, which an average passenger on a commercial flight needs in order to land an airplane left with no professional pilot and heroically save the day, is some quick advice from the control tower on how to operate a round out. Many intelligent (and otherwise sensitive) human beings who never used a wheelchair do not realize just how hard it could be (and tiring, and stressful) to move around and about for a person with a wheelchair, even along perfectly paved paths and streets. After reminding us about the distinction between smart means, and admirable ends, about the distinction between plural and monistic conceptions of well-being, and about the distinction between aggregate measures of well-being, and their distributional implications, the distinction between economic and social development should remind us then that distribution itself matters, in very *different* ways, for different individuals.

As we shall see in a moment, the distinction between economic and social development (and, most importantly, the reasoning behind remembering it in practical discourse) has a direct relevance for equal access to justice as well. Which means, in turns, that any sensible approach to the latter should be able to account for, and give appropriate expression to, the practical concerns which motivate the distinction itself: 1) a concern with appropriately distinguishing between the means and the goals of development; 2) a concern with pluralism in the specification of the relevant goals; and 3) a concern with distribution, and with distribution among differently situated individuals.

2.1. Economic development and crime prevention

To illustrate the relevance of the distinction between economic and social development for the access to justice scholar and practitioner, consider one classic economic model of criminal behavior. On this account, people's propensity to commit crimes rationally responds to the expected costs and benefits of criminal activity.⁵ Crucially, legal sanctions are *not*, in this model, the only expected cost, which is relevant for criminal choice. Among these, we should include, also, the opportunity costs of criminal conduct. The intuition is that by engaging in criminal conduct, criminals have to forego some of the benefits of *legal* economic activity.

So, the segue here is that social planners have at least three levers which they can pull, in order to reduce criminal activity: they can either raise sanctions, or increase the probability of incurring in one (i.e., providing for better enforcement), *or* raise the opportunity costs of criminal activity. Which means, in turns, that economic development

⁵ See Becker, Gary S., *Crime and Punishment: An Economic Approach*, 2 JOURNAL OF POLITICAL ECONOMY 169 (1968).

itself is an important tool for protecting people against crimes: by allowing people to get wealthier in *legal* ways, we protect them (and those that they interact with) against crimes too.

Now, the practical implications of this model are far from being fully understood and explored by empirical research, but the theory behind it does seem to track real and observable phenomena.⁶ For example, consider the possible links between economic growth and reductions of criminal activity among foreign nationals. In a significant number of European countries, foreign nationals take a disproportionate share of the prison population. But can we infer from this that foreign nationals have a higher propensity to commit crimes? Do the general conditions of the economy matter at all?

One big difference between foreign nationals and locals is that the former need specific permits in order to reside in the country and find legitimate income opportunities in the economy. So, it is a prediction of the economic model of criminal behavior that, in order for the link between economic opportunity costs and propensity to commit crimes to be practically operative for them too, we need to make sure, *also*, that foreign nationals in a given country can both acquire, and hold on to, the *status*, which grants them access to legitimate income opportunities. Indeed, the acquisition of legal status has been shown to lower the propensity to engage in crime by foreign nationals.⁷ So it isn't really economic growth (and certainly not aggregate economic growth) itself, which is driving

⁶ See, among many, A. Witte, *Estimating the Economic Model of Crime with Individual Data*, 1 QUARTERLY JOURNAL OF ECONOMICS 57 (1980); and E. Gould, B. Weinberg, and D. Mustard, *Crime Rates and Local Labor Market Opportunities in the United States: 1979–1997*, 1 REVIEW OF ECONOMICS AND STATISTICS 45 (2002).

⁷ G. Mastrobuoni G. & P. Pinotti, *Legal Status and the Criminal Activity of Immigrants*, in 2 AMERICAN ECONOMIC JOURNAL: APPLIED ECONOMICS 175 (2015) (establishing this result for Italy); see also S. Baker, *Effects of Immigrant Legalization on Crime: The 1986 Immigration Reform and Control Act*, Discussion Papers 12-012, Stanford Institute for Economic Policy Research (2013);

reductions in crimes here. What matters, is the ability of people to take advantage of economic opportunities, through the acquisition of legal status.

Consider now domestic abuse and violence against women. Economic growth might explain reductions in gendered-based criminal activity, but the link here is *not* established by the opportunity costs of criminal activity, however. Rather, the connection is between increases in the economic opportunities that women enjoy, and modifications in the *self-perceived* contributions of women to the economic fortunes of the family. The latter might, in turns, relatively improve women's bargaining conditions in the ensuing cooperative conflict over the allocation of family resources and, thus, protect them against abuse by their spouses.⁸

In short, the links between economic development and access to justice should be explored and harnessed by reasonable social policy, as the former might protect people against (at least some) criminal activities, and thus, be instrumental in the expansion of the latter. But in order to reasonably explore and harness these links, we should keep the distinction between economic and social development in mind. That is, 1) we should distinguish between the means and the ends of development itself; 2) we should acknowledge the plurality of reasonable ends of development, as the observed instrumentalities of economic development in one area might not hold in other areas as well; 3) and we should be careful about distribution, and particularly careful about why distribution might matter in *different* ways for different individuals.

⁸ See Amartya Sen, *Gender and Cooperative Conflicts*, in PERSISTENT INEQUALITIES (TINKER ED., 1990).

2.2. Economic development and propensity to sue

Consider now one possible model for the decision to sue someone in a court of law. One's decision to sue can be modeled as a trade-off between the expected benefits and costs of obtaining a favorable judgment. Among the costs, we should include the opportunity costs of cultivating the claim itself. Which otherwise profitable activities should I postpone, or renounce to, or decline to invest in, in order to assure myself a reasonable chance of prevailing at trial? On this model then, the specific conditions of the general economy are bound to influence one's decision to bring suit: as the probabilities of finding alternative venues of profitable investment grow, the opportunity costs of investing in trials should grow as well and, thus, this is the relevant prediction, people's propensity to sue should correspondingly decrease.⁹

Relatedly, it is fairly intuitive to think that (although empirical verification could be very hard) one is *less* likely, for example, to sue his landlord in order for the latter to refurbish the room he is renting, if one can secure more decent, alternative housing through the market. Whereas one is *more* likely to sue his landlord, in a similar situation, if one cannot secure alternative housing through the housing market. There is no need to invoke opportunity costs to explain variations in one's propensity to sue here: economic opportunities (and wealth generally) protect people against harms by others by allowing for alternative ways to secure the relevant good, which specific others might be threatening.

⁹ See T. Ginsburg & G. Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31 (2006).

Still, we should be very careful, and the distinction between economic and social development teaches us how. First, the idea that people value trials and courts instrumentally – that is, as a means to *further* ends – and thus, are ready to compare the expected benefits and costs of the latter, when deciding whether to sue someone, or not, seems, indeed, much intuitive and powerful (incidentally, it also seems very good advice to give, to anyone deciding on whether to sue someone else: ‘think carefully, what is it that you think you are going to achieve, and at which costs, by bringing suit?’).

But economic opportunity costs (relevant as they might turn out to be) are not the *only* costs, which people have to endure, whenever they participate in trials. So, *before* we can give any reasonable advice to any reasonable social planner on how to exploit the observed relation between economic development and people’s litigiousness, we should know and understand, first, which *other* costs we should expect trials to cause to the individuals involved. Then, we should find out whether these *further* costs (and, most crucially, the expectation of these costs) are actually understood, and acted upon, within people’s reflections on whether to sue someone else. Only then, this is the relevant point, we could be in a position to give competent advice on how to use economic costs (both *direct* ones, as well as those which depend on incompatible alternative uses of the same resources – assuming that both these costs are the easiest ones to re-distribute), to steer people’s litigious behavior toward the realization of admirable (or even simply non socially harmful) directions.

Second, and relatedly, reasonable public action on the relation between economic growth and people’s propensity to sue, calls for the definition of objective *thresholds* in the comparisons of the expected costs and benefits of litigation.

One thing is to observe that a large segment of the population decides *not* to actively participate to the trials it could be a party to (even when there are obvious expected benefits from such participation), because the alternative (incompatible) uses of the resources (required for litigating) include security in employment, or the purchase of health care, or even inclusion in a economically valuable social network. In *these* cases, the expected benefits of participation in productive economic activity help to keep litigiousness down (thus benefiting society as a whole, as they reduce – some of – the social costs of trials), but at a price that a decent legal system should reasonably refuse to pay. But it is an entirely different thing to observe instead that opportunities in the general economy afford one the choice to secure the enjoyment of the relevant good, which litigation is designed to protect, through alternative (non-contentious) means.

In short, in order to aptly differentiate among these cases, we need to set our research agenda on establishing reasonable objective thresholds, and on being able to say: ‘above this threshold, it is generally fine and well, when people decide to trade off expected costs and benefits, before deciding to take full advantage of litigation opportunities; whereas below this threshold, it is not fine and well when people decide to trade off expected costs and benefits, before deciding to take full advantage of litigation opportunities’. These latter scenarios call instead for appropriate public intervention, aimed at reducing the expected costs of trials.

3. Markets as idealized conditions of exchange, and markets as a set of institutions: on the analytical priority of access to justice

A second, standard, distinction, which is directly relevant for the field of equal access to justice is the distinction between markets as a set of idealized conditions of production and exchange, which jointly define the norm of perfect competition (which include, for example: profit maximization of sellers, rational buyers, perfect information, no externalities, no barriers to entry or exit...), and the concrete institutional, social, cultural and behavioral conditions which, in any given country or geographical area, either support, or hinder, the institutionalization of markets which approximate the norm of perfect competition.

To illustrate, consider a very short summary of Hernan de Soto's influential (and ever expanding to novel domains and areas of human cooperation)¹⁰ argument in the *Mystery of Capital*.¹¹ Contrary to popular understanding, de Soto argues, this 'thing', which classic economists called 'Capital', is not (or should *not* be intended as anyways) anything 'tangible', like money – rather, its value resides in a 'transcendental', or 'metaphysical' quality, which we attribute to, or extract from, various tangible objects, depending on our ability to convert them in productive uses. In de Soto's account, such conversion abilities depend on, or rely upon (their 'metaphysical' nature notwithstanding), a set of very concrete institutional abilities and powers, which include, chiefly, the *legal* capacity to include one's assets in a formal property system: "It is formal property that provides the process, the forms, and the rules that fix assets in a

¹⁰ De Soto, Hernando, *The Capitalist Cure for Terrorism*, The Wall Street Journal, 10th October 2014.

¹¹ H. DE SOTO, *THE MYSTERY OF CAPITAL* (2000).

condition that allows us to realize them as active capital”.¹² In de Soto’s reconstruction, it is precisely the resulting inclusion of one’s assets within a formal property system, which generates, in turns, the six central effects which allow citizens to transform their tangible assets into active capital: 1) Fixing the economic potential of assets; 2) Integrating dispersed information into one system; 3) Making people accountable; 4) Making assets fungible; 5) Networking people; and 6) Protecting transactions.¹³

Add now an empirical premise (namely, the fact that, according to de Soto, “Dead capital, virtual mountains of it, lines the streets of every developing and former communist country”¹⁴), and there you have an important, and much influential, argument in development, and which directly relates, as we shall see in a moment, with access to justice itself: the problem with economic development in the so called third world is *not* global distribution of assets, or its colonial past, or its post-colonial present; nor is it geography or natural resources, or business culture. The problem lies in the fact that many people in these countries *already* possess an enormous amount of assets, but lack, however, the institutional processes (chiefly, formal property systems), which could enable them to transform such assets in economically productive capital and, thus, generate wealth.

Now, as with most influential theses, this is a very controversial one too and, thus, quite an improbable candidate to figure in any list of considered judgments in the field of access to justice. But the point I shall try to hammer out from this very brief and sketchy presentation does *not* depend on one’s agreement with de Soto’s diagnosis, or on one’s beliefs that he is right in part but wrong in some details, or on one’s complete

¹² *Ibid.* at 46.

¹³ *Ibid.*, at 49 – 62.

¹⁴ *Ibid.*, at 32.

disagreement with every that de Soto's says. (Indeed very little of what I said so far, and virtually nothing of what I shall in the rest of the essay, actually helps to adjudicate these claims).

This is it: At first blush, de Soto's argument might look a lot like an empirical version of the argument on the analytical priority of access to justice, with respect to economic development. Do you want these things, which economists call 'markets', to deliver what they promise (namely, economic development and growth)? Well, what you need to do is to make sure that people in the country under observation are given the institutional capacity to include their assets within a formal property system. And notice, the very definition of such institutional capacity, just as much as the very description of the effects which de Soto attributes to expansions of such institutional capacity, inevitably make abundant use of all the three clusters of concepts, which, we observed, most approaches in access to justice use too. To include one's assets within a formal property system means to acquire some form of legal protection for one's assets. And it also means that one has acquired a particular *status* with respect to such assets – that is, that one has standing to make, as well as resist, claims with respect to such assets, and thus, that one *stands*, with respect of such assets, in a particular relation with *all* other potential claim makers in a country's jurisdiction. Finally, having the formal capacity to do and be all such things, means that one has acquired at least the formal competency to act as an agent in one's legal affairs. You believe de Soto's argument, and you believe, also, that something very much like access to justice is necessary (and, perhaps, sufficient too) for markets to deliver economic development and growth.

But there is a flip side (a dark one, some would say) to this argument. If access to justice is necessary for economic development, then, analytically, all we need to really care about is economic development and growth, even when we care about access to justice for reasons *other* than economic development itself. Whenever we observe that an economy is getting wealthier, we *also* have very good reasons to believe that all is well and fine with access to justice itself.

Now, this is definitely too quick and, I would bet, not even the most enthusiastic supporter of de Soto's recipe for economic development and growth in the third world would want, on reflection, to commit himself to this latter argument. And yet, pondering a little more on why this latter argument is obviously wrong, might tell us something valuable about what it is that we should demand, and how, when we make demands in access in justice.

For one thing, we should be careful about what, exactly, we are committing ourselves to, when we rely on de Soto's argument, in order to advocate for access to justice. De Soto's argument is about institutional powers and rights, and their impact on economic growth in some, very narrow, areas – namely, formal property rights. So, to persuade one that access to justice is good because it is necessary for an economy to grow, will, at best, persuade that person about the importance of access to justice in a very narrow area of social cooperation. Indeed the force of de Soto's argument depends on the observation that a vast majority of people in the third world do *not* have access to formal markets because they do *not* have the legal capacity to include their assets within a formal property system: reduce the portion of people that are so cut off, and the consequences will be beneficial to economic growth. But there is no commitment about

access to justice in other areas of cooperation, and there is certainly no commitment to (not even an interpretation of) equality even in the area of property rights. So there is no reason to think, even on de Soto's account, that economic development itself could be used as a good proxy for access to justice. All that economic development needs, for de Soto's account to work, is that a *sufficiently large* number of people enjoy *some form* of the legal capacity to include their assets within a formal property system.

Relatedly, on de Soto's account, the legal capacity to include one's assets within a formal property system is *not* a necessary condition for markets to function: access to the formal economy is *not* coextensive with access to markets. Again, de Soto's argument has traction to the extent that it can identify differences between access to markets, *in absence* of the legal capacity to include one's assets within the protection of formal institutions, and access to markets when such legal capacity is itself protected and nurtured.

But in order to address such differences, in a way which is relevant for access to justice in general, and equal access to justice in particular, we need to: 1) be able to move from mere aggregate measures of economic development and growth, to ones which account for individual wealth, and advantages; 2) be able to account for individual variations of people's abilities to convert whatever resources, assets, or 'capital' they happen to possess and hold on to, into economically productive activities; and finally 3) be able to account for the impact of differences in 2) on people's ability to act (and be) in ways they find valuable.

6. EQUAL ACCESS TO JUSTICE AND THE MARKET FOR LAWYERS

COMPETITION AS AN INCENTIVE TO COMPLY

1. Introduction

Chapter 5 discussed the general relation between economic development, markets and access to justice (drawing on mostly, but not exclusively, theoretical insights), and have tried to show the relevance, for any reasonable approach to equal access to justice, of two rather standard distinctions – namely, the distinction between economic and social development, and the distinction between markets as idealizations of the norm of perfect competition and markets as a set of institutional, social and behavioral conditions. Any reasonable approach to equal access to justice has to take note, and give an adequate account, of both such general distinctions, in order to get off the ground.

The plan now is to draw on such insights (and a few others, to be presented shortly), in order to establish what it is that we need from, and should demand to, any reasonable approach on equal access to justice, in order to study the specific role, which markets *in* access to justice may, or may not, play, in protecting equal access to justice for all.

For simplicity, in the following I shall make explicit references to the market for lawyers only, as *one* (among many) of the possible (that is, either existing, or that we can think about instituting, with some degree of imagination) markets in access to justice, and talk of *other* markets (as the markets in education and professional training), as they relate to the market for lawyers. I further assume that there is at least one, unbreakable,

monopoly in access to justice – namely, that there is one single ruler (or a – more or less – coordinated set of rulers), who is in charge for the production of valid laws and regulations; *and* that there is a specific class of people (judges), who are exclusively authorized to ‘declare’ what the law is in any given instance.¹

Now, the cash value of thinking about markets, in terms of the idealized norm of perfect competition, is that economic theory tells us that markets, which operate close to such norm, will tend to maximize aggregate consumer welfare. Roughly speaking, this means that, as we get closer to the norm of perfect competition, we can trust markets to let goods gravitate around those who value them the most (in some sense of valuing), *and* are able *and* willing to pay for them.

Two further premises are in order, before we dive in discussing the market for lawyers. First, the third clause of the above description of the *effects* of markets in the allocation of goods (‘willingness to pay’) might seem redundant at best, and confusing at worst – *willingness* to pay for something is precisely what tracks (or what is supposed to

¹ Gillian Hadfield contests this assumption, in her important contribution on the distortions in the market for lawyers in the US; see G. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000). She explicitly entertains the possibility of breaking this ‘monopoly’ up, and she identifies it as *one* central source of distortions, which the market for lawyers produces, thus affecting access to legal services. Even though my own analysis has substantially benefitted from Hadfield’s analysis in a great number of places, I do *not* discuss this possibility in this section, because I find it extremely hard (conceptually, I mean) to even entertain the possibility of introducing markets (as opposed to monopolies of various kinds) in the very production, and declaration, of laws (and in some part of their application). Indeed, her own discussion seems to me to relate directly to existing alternative institutional arrangements, like federalism, or separation of powers, or democratic governance, rather than to a market-based alternative properly understood. So my interpretation, indeed contra-textual, of this bit of Hadfield’s important analysis is that market analysis is just *not* enough to account for the operations of the market for lawyers, as the latter is significantly influenced by *other* institutions, which do not easily lend themselves to market analysis (of course, in a metaphorical, or analogical one at least, sense, everything whatever in the world lends itself to market analyses of different kinds – all we need to do is to use the latter’s vocabulary and assumptions, and impose them on our field of study. This is, of course, an important and (possibly) enormously insightful exercise, depending on the context and the specific assumptions – behavioral or otherwise – which we are willing to impose on our field of choice. Analyzing something *as if* it were a market, doesn’t make it so, however). For the classic analysis of adjudication *as if* it were a market, see W. Landes & R. Posner, *Adjudication as a Private Good*, in 8 THE JOURNAL OF LEGAL STUDIES 235 (1978).

track) one's valuations of it. (Indeed, that's one of the key ingredients of a perfectly competitive market.)

But the underlying behavioral assumption is particularly hard to swallow, especially in the field of access to justice, as there might be a difference (depending on the good which is being chosen, and the context of choice itself) between one's preferences over different alternative 'consumption options', and one's willingness to *act on* such preferences in a way, which makes one's preferences visible (or revealed in one's choices) to others. The point has a general relevance (as it questions the reasonableness of a host of formal properties – like transitivity – which are standardly imposed on choice and behavior in markets²), but it has a direct, and fairly intuitive, bearing on access to justice as well.

Here is a rather straightforward example: a gay teenager may well prefer *not* to be bullied by his colleagues at school (excluding complete internalization of discrimination as a brute fact of life). So, look (through the proverbial peep into his brain) at his preferences, and at his resources, and his preferred consumption option in access to justice might well include reporting the bullies to the reasonably well functioning anti-discrimination center, which has been instituted at this school – and get them to stop. But it is a big leap to infer from all of this that he is willing to *act on* such preference (even assuming that his own resources are perfectly lined up to enable him to get what he 'wants'), either in virtue of some code he confers legitimacy to ('you are *not* supposed to tell on your colleagues'), or because he does not want to reveal, to some of his relevant others, his preference for a non discriminatory environment.

² See A. Sen, *Maximization and the Act of Choice*, 4 *ECONOMETRICA* 745 (1997).

Second, the effects of markets are not *just* a one-shot static allocation of a specified number of goods. Rather, we shall evaluate them dynamically and comparatively. As we expand market opportunities in the allocation of a particular good or service, we change the incentives, which act upon people's choices and behavior. And we evaluate the effects of these, as we consider how much the *real* market under consideration deviates from a perfectly competitive one.

In short, to evaluate the effects of market allocations (and compare them with other alternative arrangements) is not *just* to evaluate a static distribution of goods and services (although it is *also* that, a point that we pressed with the distinction between economic and social development). To evaluate the effects of market allocations is, also, to evaluate the dynamic effects of incentives on people's choices and behavior, and to assess the extent to which deviations in a real market from the imaginary standard of perfect competition can be cured through market 'fixes', or through direct public intervention.

2. A static interpretation of the market for lawyers

A merely *static* interpretation of the effects of markets clearly condemns them as an unreasonable mechanism for the allocation of legal services. Aggregate maximization of consumer welfare does *not* track the ideals of equal legal protection, and of equal standing in open court. Or, to put it differently, it would be hard to argue anything at all about, for example, the degree of correspondence between people's rights and privileges and the actual outcome of legal cases, or about people's formal abilities to stand as equals as they argue about their cases in court, from the mere fact that consumer choices over

bundles of legal services in any given market actually maximize aggregate consumer welfare. These three concepts refer to three very different portions of social reality, and nothing we can find out about either one of them can tell us (in it and of itself) anything at all about the other two. This much explains the intuitive judgment that *any* argument in equal access to justice should be directed at *upsetting* a given market allocation of legal services, and at explaining when, and why, maximization of aggregate consumer welfare through a perfect competitive market in legal services is *not* compatible with equal access to justice for all. And this much is fairly easy to show, as an aggregate measure of something doesn't tell us anything at all about its individual components.

The ideal of equal agency in legal affairs (which is the third foundational concept in access to justice, which we have explored so far) provides one with a lot more room to argue about the *static* relation between equal access to justice and markets. *If* (and to the extent that) equal access to justice is nothing but, say, unfettered discretion over litigation choices (one historic interpretation, and component of, the ideal of equal agency in legal affairs itself) then protecting markets in legal services might begin to look a lot like a very reasonable way to protect equal access to justice in general. But notice, this has *nothing* to do with the purported effects of markets (namely, maximization of aggregate consumer welfare). In fact, the argument is based on an analogy between (what is taken to be) a constitutive feature of markets in general (namely, unfettered discretion in consumption choices over bundles of different goods and services) and what markets in litigation would look like (namely, unfettered discretion over litigation choices). We shall see in a moment why the analogy is a faulty, and rather dangerous, one, as the market for

legal services is fundamentally different than markets for *other* consumer goods.³ But none of this is really necessary in order to show why the strategy to defend markets in legal services, by appeal to the ideal of agency in legal affairs will not go very far in producing a reliable argument on equal access to justice: the ideal of agency in legal affairs does not provide (and much less so when it is itself reduced to the idea of unfettered discretion), as we have already seen, an adequate base for understanding the demand for equal access to justice for all.

3. The dynamic effects of market

When we shift our attention to consider the dynamic effects of the market mechanism, the idea to let market forces determine the allocation of legal services begins to look much more attractive, however. I distinguish in the following between two sets of (mainly theoretical) reasons, which should help us track the possible virtues of markets in access to justice. I discuss, first, the dynamic effects of maximizing aggregate consumer welfare in the allocation of legal services. Second, I elaborate on the virtues of markets, which do not depend on the maximization of aggregate consumer welfare.

³ One good example which shows the difficulties of such strategy will appear much later in this essay, in the chapter on collective, or group, litigation. One popular (and classic) argument against the introduction of forms of group litigation laments the commercialization of the legal profession, which (quite understandably) is taken to follow from the standard set of reforms connected with the introduction of the class action device in particular (chiefly, the abolition of advertising restrictions, and the transformation of lawyers in entrepreneurs, through the introduction of contingency fees arrangements), and yet the *same* argument typically exploits an analogy between property rights in general, and the degree of control which parties should enjoy over their own dispute, in order to contest the legitimacy of group litigation itself. As we shall see, there are many sophisticated ways to rationalize this position in a set of plausible (although, as I shall argue, ultimately wrong) arguments, but it seems that something has got to give: *either* it is unreasonable to think of lawyers as entrepreneurs (just like any other entrepreneur in any market worthy of the name), *or* it is reasonable to think of parties as consumers leveraging their property rights over their disputes in order to maximize their own welfare.

3.1 Efficient compliance and deterrence

One foundational argument in access to justice frames our reasons for instituting courts, judges, or prosecutors, as an exchange between contracting parties and the state. By supporting access to justice institutions, we give up self-help, in exchange for legal protection. On this account, we collectively buy people's compliance with the law (as we demand that they reject self-help), in exchange for legal protection.

I will say a lot more about this argument later on in this essay, and explain why we should not trust it as a *good* reason (or a reason which is good enough) for valuing and supporting equal access to justice for all. But its ability to do its normative work (persuade us that equal access to justice is good and valuable, indeed a requirement of justice itself) is really orthogonal to the work I should like it to do here. All we need to believe is that something like such argument tracks people's *actual* reasoning when they *voluntarily* choose to comply with the law.⁴

Notice, furthermore, that the argument operates at least a couple of steps after the traditional contractarian context. We have *already* specified people's basic rights and duties, and we are bidding on the concrete resources, which are necessary to give concrete application to such rights and duties.

⁴ There are problems (empirical ones) here too, however, which readers who are *either* very skeptical, *or* enthusiastic supporters, of economic analysis of law in general might have already identified (and, quite oddly, might agree upon): the reasoning involved is one which is typical of a person who wonders about the fairness and legitimacy of his choices – altogether a very *different* kind of animal than the kind of rational maniac who is (or was, at any rate) presupposed, by standard rational choice theory. It would most definitely be *irrational* (in the narrow sense of RCT) to comply with the law for such reasons, as self-help and use of legal opportunities for redress are *not* 'technologically' incompatible choices. They are *made* incompatible by one's morality, if the argument works on one. But bear with me, nonetheless. All we need to assume, to keep the argument going is that: 1) the contractarian reasoning involved does track at least *part of* people's moral/political reflections on their duty to comply with the law; and 2) that making a moral choice easier for one, increases one's propensity to choose morally.

Now, if one believes all that, one has good reasons to believe *also* that bidding on the allocation of legal services through perfectly competitive markets will allocate the former in a way which is socially convenient for all. If compliance with the law is bought off by legal protection in exchange for giving up self-help, we can trust markets to allocate legal services precisely where self-help options are relatively *more* valued and, thus, where it is *more* likely that the provision of legal services *increases* the likelihood of people's compliance with the law.

Note that significant inequalities in access to legal services (caused by differential abilities to pay for the latter, and willingness to do so) could still be very harmful. Inequalities in people's abilities to pay for legal services would tend to determine differences between the preferences that people have over alternative consumption choices, and the preferences that we maximize – in the aggregate – through market exchanges. This could mean, in turns, that compliance with the law might be comparatively more convenient for the relatively better off. But this could still be beneficial for the comparatively worse off, as long as we believe that when we increase the probabilities that the relatively *more* powerful (those who are relatively more able and willing to pay for legal services in one country) comply with the law, we *also* increase the probabilities of effective legal protection for all the rest.

Would interference with market prices cause relevant distortions to this basic mechanism? Problems, in this case, would seem to arise when we consider how this contractarian mechanism integrates with law's deterrent functions. On one hand, from the plaintiffs' perspective, we can trust perfectly competitive markets to efficiently allocate legal services to those who burden the relatively bigger share of the expected costs of

socially harmful activity. On the other, from the defendant perspective, as we *lower* the price of lawyers for any group of potential defendants, through public intervention, we reduce the expected costs of legal sanctions, by either directly lowering the probability of being sanctioned at all (as cheaper lawyers might lower the chances of being found guilty), or indirectly, by lowering the expected costs of sanctions (as we provide cheaper lawyers, people expect to pay less, if they are caught, in order to mount an adequate defense).

On this (abstract, and largely hypothetical) account then, we have good reasons to institute (perfectly competitive) markets for legal services, even when we observe significant inequalities in people's abilities to pay, as we have reasons to believe that the *dynamic* effects of competitive markets will be beneficial for all, along one foundational dimension of equal access to justice (namely, effective legal protection for all). Furthermore, we should estimate the appropriate magnitude of public intervention through a careful estimation of its two opposite effects on compliance and deterrence. As we establish which one actually dominates the other, we decide on whether to intervene to alter market prices (for specific classes of individuals), or rather let market forces alone to allocate legal services.

3.2. Patrolling the frontier

Elaborating on a very common observation, Marc Galanter once argued that:

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

because it is indissolubly linked to the expanding realms of human knowledge and technical feasibility and to the elevated expectations that they generate.⁵

Galanter is not alone in worrying about the dynamic relation between “perceived injustice” and “rising expectations”, modeled by the growth of “human knowledge” and by “advances in technical feasibility”, and many different ways to interpret it have been offered and discussed by a large literature. Call this the ‘ever expanding frontier hypothesis’.

In many ways, the very common, and widespread, social worry about so called ‘litigation explosions’ (which Galanter himself spent a considerable amount of time to prove wrong, and unfounded) could be read as one, rather pessimistic and dark, interpretation of such hypothesis. Public institutions, technological progress, and egalitarian political mobilization have made people grow an ‘insatiable appetite for a risk free world’. There is no hope for equal access to justice for all because any advancement in the latter will always be matched by the perception of *new* harms and vulnerabilities and, thus, by increases in the demand for litigation in particular, and claim making in general. Equal access to justice is an expanding (and ineffable) frontier, because as we move closer to it, it shall further recede on the horizon.

There could be a less pessimistic reading, however. Perhaps the relation between perceived injustice and rising expectations is *not* mediated by insatiable appetites alone. It could be the simple fact that the application of justice requires *more* (or, at least, something different, and altogether messier) than purity of heart, and self-applying formal rules, which shall be fixed once and for all. It could be that it requires, also,

⁵ See M. Galanter, M., *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URBAN LAW JOURNAL 115 (2010).

proactive individual engagement and social discovery, so that we *learn* what we want (or do *not* want) in social relations generally, by actively engaging in the *process* of making claims, and of reacting to the claims of others. Equal access to justice has an ever-expanding frontier, to be sure. But its ineffability should *not* deprive us of a sense of advancement and progress, as we move forward.

Either way, if the underlying empirical prediction is even approximately right (meeting demands in access to justice causes *new* demands to arise), then market discipline in legal services looks extremely attractive. We *both* want price to approximate marginal cost, and we want actual users to pay for it, in order to make sure that as the frontier expands, it does *not* do so at the expense of the efficient allocation of social resources generally.

Perhaps this is best seen, rather than as a direct virtue of markets, as a cure to the *vices* of alternative allocation mechanisms. Notice that, if we believe in the ever-expanding frontier hypothesis, inequalities in the ability to pay for legal services become particularly troublesome. As the frontier moves depending on the demands, which are actually meeting, whoever (and whichever claim) is excluded at any given time, will be excluded in the future even *further*.⁶ But as we intervene on the price of legal services, the concrete risk is that total costs will quickly escalate beyond any possibility of control: whatever amount of legal resources that we are committing ourselves to finance *now*, we are committing ourselves to increase it even *further* in the future. So, we *need* market

⁶ This is clearest whenever the development of substantive law depends on the activation of courts' proceedings (like in common law jurisdictions, at least in their stereotypical representations). But the point can be easily generalized even to cases when the enactment of valid laws rely upon the intervention of other institutions as well (like parliaments), as the demand for *new* laws might still depend on how *old* laws have been applied.

discipline in the allocation of legal services because as we allocate use *independently* of ability to pay, we give up one effective tool to control the escalation of costs.

3.3. A tentative equilibrium

Consider these two mechanisms together (the market mechanism as tool to push social behavior toward efficient compliance and deterrence; and the market mechanism as a tool to patrol the ever-expanding frontier of legal services), and there you have a simple way to rationalize the *status quo* with respect to the market for lawyers in a significant portion of contemporary legal systems.

We institute markets in legal services because we want to make voluntary compliance with the law a relatively more palatable choice, while guaranteeing efficient deterrence. We support public intervention, in order to offset systematic under investments in legal enforcement. But we limit the former to cases in which costs are not endogenously determined by the beneficiaries themselves (so we institute public prosecutors in criminal trials, and provide free counsel to indigent criminal defenders, but nothing else), in order to protect ourselves against distortions in law's capabilities to appropriately deter, and against the uncontrolled expansion of costs.

4. The virtues of the commercialization of law

So far we have discussed the virtues of markets in the allocation of legal services, which depend on the maximization of aggregate consumer welfare. *By* maximizing aggregate consumer welfare in the consumption of legal services, I have argued, we can make compliance with the law comparatively more palatable for the relatively more powerful,

and, thus, increase the probability of effective legal protection for all. Also, maximization of aggregate consumer welfare in the consumption of legal services, I have argued, allows us to efficiently patrol expansions of the demand for legal services. In order to make this case, we piled up a long list of quite ambitious assumptions, whose credibility we need to probe a lot more. But before we do that, let us elaborate on the possible virtues of markets in the allocation of legal services, from yet another perspective.

There is another argument, perhaps not as well known as the former, but with no less of a pedigree, which values markets, because they allow for (and, in some sense, presuppose) a transformation, indeed a re-wiring of sorts, of people's preferences.⁷ Markets are good, on this account, because they allow for the activation of "some benign human proclivities, at the expense of some malignant ones".⁸ I call these the 'virtues of the commercialization of law', because *by* supporting such specific institutional features, I shall argue, we typically end up authorizing a large and significant role for commerce in the provision of legal services.

The argument begins, like the previous one, by identifying self-interested motives as a leading impulse in market behavior. But whereas the first argument points to the effects on the efficient allocation of the relevant good under observation of harnessing incentives on such motives, the second one draws different implications altogether, contrasting cooperation based on mutual interest, with servile dependency.

⁷ As we shall see, the concept 'preference' itself is hardly useful to describe this process. I use it, for the moment, just to signal where *one* big difference with the former argument lies: we are not really interested in maximizing any aggregate here. We are more interested in the *maximand* in individual choice itself, and we want to change *that*, regardless of whether it is going to be maximized in some aggregate measure or not.

⁸ See Amartya Sen's Forward in A. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1997²).

This second argument's key observation is on how we, supposedly, address the problem of persuading others to cooperate with us, whenever we want to secure their help. In commerce (as one expression of the human propensity to 'truck, barter and exchange'), we do not need to "endeavour by every servile and fawning attention to obtain their good will"; rather, we "interest their self-love", and show them "that is to their advantage to do [for us] what [we] require[...] of them".⁹

Historic versions of this argument track very different dimensions, and effects of such contrast, ranging from the protection of "order and good government, and with them, the liberty and security of individuals"¹⁰, or of personal dignity itself,¹¹ to the disengagement from hostile and harmful attitudes in social cooperation.¹² Nothing in the following should be read as an attempt at a definitive assessment of either one of them.

Since this argument does *not* rely on any interpretation of what maximization of aggregate consumer welfare would entail, and of which institutions we should think are most helpful in delivering it, the argument might become even *more* valuable to explore and probe, as our skepticism about the ability of markets in legal services to deliver maximization of aggregate consumer welfare grows.

So, the plan now is to sharpen the focus on the contrast between "endeavour by every servile and fawning attention to obtain [...] good will" and showing one that is to his advantage to do what we require of him. To do so, I shall use a thick description of an encounter with a lawyer, provided by Italian literature. Then, in paragraph 5, I will try to

⁹ A. SMITH, A., *THE WEALTH OF NATIONS* (1776, 1977), at 30.

¹⁰ *Ibid.* at 539.

¹¹ Anderson, E., *Ethical Assumptions in Economic Theory: Some Lessons from the History of Credit*, 4 *ETHICAL THEORY AND MORAL PRACTICE* 347 (2004).

¹² A. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1997²).

unpack and identify what it is that we need, and demand, from an approach to equal access to justice, in order to 1) probe the empirical connections, which are illustrated in the narrated episode; and 2) harness them as a tool for valuable political purposes.

4.1. Commerce against servile dependency

In the classic Italian novel *I Promessi Sposi*, Alessandro Manzoni provides a nuanced, and vivid, description of a close encounter with a lawyer and, relatedly, of the demand for legal services, which might allow us to unpack and discern the putative effects of cooperation on the basis of mutual interest in market exchange, on how we address ourselves when we ask for the help of others in access to justice.¹³

Let me begin with a brief summary. Don Abbondio, a village priest in 17th Century Lombardy (then under Spanish domination), has been stalling on the celebration of Renzo and Lucia's wedding. Pressed for an explanation by Renzo, he admits to having been threatened by Don Rodrigo (the strong man in the village), who opposes the wedding (having no formal authority to do that), in order to get his way with Lucia.

As the story begins to unfold, and Renzo and Lucia debate on what to do, Agnese (Lucia's mother) has an idea.

“Hear me, my children; listen to me [...]. The devil is not so frightful as they paint him. To us poor people the skeins appear more entangled, because we do not know where to look for the end; but sometimes advice from a learned man – I know what I mean to say. Do as I tell you, Renzo; go to Lecco; find the Doctor Azzecca Garbugli [...]. Take with you these fowls; I expected to have wrung their necks, poor little things! for the banquet of to-night; however, carry them to him, because one must never go empty-handed to these gentlemen. Relate to him all that has happened, and he will tell you at once that which would never enter our heads in a year.”¹⁴

¹³ ALESSANDRO MANZONI, *THE BETROTHED* (TRANS. FROM ORIGINAL ITALIAN BY COUNT O'MAHONEY) (2012).

¹⁴ *Ibid.* at 28.

Somewhat hesitantly, but with hope, Renzo decides to follow up on Agnese's advice, and, armed with Agnese's fowls, goes to the city in search for the end of his entangled skeins. Manzoni grants us a privileged perspective onto Renzo's mixed feelings:

I leave the reader to imagine the condition of the unfortunate fowls swinging by the legs with their heads downwards in the hands of a man agitated by all the tumults of passion; and whose arm moved more in accordance with the violence of his feelings, than with sympathy for the unhappy animals whose heads became conscious of sundry terrific shocks, which they resented by pecking at one another, a practice too frequent with companions in misfortune.¹⁵

As Renzo arrives in the city, he asks for the house of the Doctor, and he is eventually directed to the learned man's study:

On entering, he experienced the timidity so common to the poor and illiterate at the near approach to the learned and noble; he forgot all the speeches he had prepared, but giving a glance at the fowls, he took courage. He entered the kitchen, and demanded of the maid servant, "If he could speak with the Signor Doctor?" As if accustomed to similar gifts, she immediately took the fowls out of his hand, although Renzo drew them back, wishing the doctor to know that it was he who brought them. The doctor entered as the maid was saying, "Give here, and pass into the study." Renzo bowed low to him; he replied with a kind "Come in, my son," and led the way into an adjoining chamber.¹⁶

Needless to say, Renzo will *not* find help in the Doctor's chamber. Instead, the Doctor first understands Renzo's story exactly backwards, and mistakes him for one of Don Rodrigo's thugs, who has threatened a priest, wanting to prevent a wedding, and now worries about a possible punishment. Ironically, in *that* case, the Doctor would have been able and willing to help, as he makes immediately clear, without even having to wait to hear Renzo's full story.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

As we learn from the Doctor himself, there does seem to be a legally valid edict, which punishes the harassment of priests, and *that's* why Renzo needs him:

"I can do nothing," replied the doctor, shaking his head, with a knowing and rather impatient smile, "nothing, if you do not trust me. He who utters falsehoods to the doctor is a fool who will tell the truth to the judge. It is necessary to relate things plainly to the lawyer, but it rests with us to render them more intricate. If you wish me to help you, you must tell all from beginning to end, as to your confessor: you must name the person who commissioned you to do the deed; doubtless he is a person of consequence; and, considering this, I will go to his house to perform an act of duty. I will not betray you at all, be assured; I will tell him I come to implore his protection for a poor calumniated youth; and we will together use the necessary means to finish the affair in a satisfactory manner. You understand; in securing himself, he will likewise secure you. If, however, the business has been all your own, I will not withdraw my protection: I have extricated others from worse difficulties; provided you have not offended a person of consequence;—you understand—I engage to free you from all embarrassment, with a little expense—you understand. As to the curate, if he is a person of judgment, he will keep his own counsel; if he is a fool, we will take care of him. One may escape clear out of every trouble; but for this, a man, a man is necessary. Your case is a very, very serious one—the edict speaks plainly; and if the thing rested between you and the law, to be candid, it would go hard with you. If you wish to pass smoothly—money and obedience!"¹⁷

But as the Doctor realizes that he misunderstood Renzo – indeed, as he realizes that he got it exactly *backwards*, and that it is *Renzo* who is seeking protection from the harassment of Don Rodrigo – he quickly refuses to help, and sends Renzo away:

"Begone, I say; what have I to do with your protestations? I wash my hands from them!" and pacing the room, he rubbed his hands together, as if really performing that act. "Hereafter learn when to speak; and do not take a gentleman by surprise."

[...]

The doctor, still growling, pushed him towards the door, set it wide open, called the maid, and said to her, "Return this man immediately what he brought, I will have nothing to do with it." The woman had never before been required to execute a similar order, but she did not hesitate to obey; she took the fowls and gave them to Renzo with a compassionate look, as if she had said, "You certainly have made some very great blunder." Renzo wished to make apologies; but the doctor was immovable. Confounded, therefore, and more enraged than ever, he took back the fowls and departed, to render an account of the ill success of his expedition.¹⁸

¹⁷ *Ibid.* at 30

¹⁸ *Ibid.* at 31

Clearly, this is a story, also, about unequal access to justice, as we have defined it throughout this essay. Renzo (and Lucia, let us remind ourselves) has interests – to use a contemporary vocabulary: to be free to marry, and, Lucia, to be free from violence and abuse – which valid laws in 17th century Lombardy would seem to protect, at least partly. Presumably (although Manzoni does not tell us the exact details), the betrothed also have standing (or Renzo has, on behalf of both) to make formal claims to invoke such protection, and (Renzo has) the formal capacity to act in meaningful ways as they do so. But their ability to transform such formal capacities in real achievements (get married, and be safe against violence) is contingent on the goodwill of an all-powerful individual (Don Rodrigo), who can decide their fate. It would also seem that the static interpretation of the effects of markets that we discussed above, provides one with a compelling understanding of what went wrong. Legal services are allocated according to one's ability to pay, and Agnese's fowls will not do, to secure Renzo with an effective amount of them (as the Doctor will not help Renzo). Indeed, markets would seem to be the main culprit: the highest bidder (Don Rodrigo) is authorized to impose its will on others, no matter what formal laws say and condemn.

This diagnosis is on the right track, but wrong in the details. *One* problem is precisely that there seems to be *no* market for legal services worthy of the name, and *not* that the existing one misallocates legal services to the relatively more powerful, leaving the rest with no advice and representation.¹⁹ The Doctor does seem to render some kind

¹⁹ The extent to which we believe that this is *the* reason, which explains Renzo and Lucia's unfavorable predicament largely depends on whether also we believe the Doctor, when he says to Renzo (believing that he is one of Don Rodrigo's thugs) that "if the thing rested between you and the law, to be candid, it would go hard with you". Most probably, the Doctor is overselling the point to Renzo, as he has a clear interest in depicting the situation as much more serious than it actually is (assuming that Renzo is one of Don Rodrigo's thugs) – and that's *not* something, which a market in legal services by itself will help to cure. But perhaps he is only partially overselling the point, and Renzo has indeed a fighting *legal* chance to protect

of service (which makes some use of legal knowledge and expertise, to be sure), in exchange for some kind of compensation. But his business is clearly *not* to provide legal advice and representation, in exchange for a profit, and Renzo he is not even a prospective *client* of his, much less a buyer of legal services in anyway. Rather, what the Doctor seems to be doing is to extract a rent, by taking advantage of his peculiar position. Let me unpack these thoughts.

First, notice that Agnese's fowls are not really the price for the Doctor's services. They are merely a chip, which Renzo uses, in order to show his goodwill and obedience ("As if accustomed to similar gifts", Manzoni says, referring to Agnese's fowls and describing the attitude of the Doctor's maid): as Agnese reminds us, "One must never go empty-handed to these gentlemen". Also, the Doctor does render some kind of legal advice to Renzo, as he reads with him (before he realizes which purposes Renzo wants to use his advice for) the relevant edicts. And yet, in a clear show for the benefit of his maid, he refuses payment for them ('look, I have not taken what he brought, so do not go around telling people that I talked with him, and helped him in anyway'). All in all, it would rather seem that the Doctor is after a *different* kind of compensation altogether. His business seems to be here to arbitrate negotiations between Don Rodrigo and his thugs (mistakenly recognizing Renzo for one of them), and then extract benefits from Don Rodrigo himself. Consider his plan again:

You must name the person who commissioned you to do the deed; doubtless he is a person of consequence; and, considering this, I will go to his house to perform an act of duty. I will not betray you at all, be assured; I will tell him I come to implore his

himself (and Lucia) from Don Rodrigo's thugs. Of course, the line serves rhetorical purposes especially: 'look', Manzoni could be read as telling us, 'the only chance for the law to be interpreted in a way, which is favorable to people like Renzo (and Lucia), is when the interpreter mistakes them for someone else, *and* assumes that he is being contracted for the purpose of extracting a profit from people like Don Rodrigo, whenever they (or their acolytes) are looking to by-pass formal laws in order to get their way with whomever they want'.

protection for a poor calumniated youth; and we will together use the necessary means to finish the affair in a satisfactory manner. You understand; in securing himself, he will likewise secure you. [...] If you wish to pass smoothly—money and obedience!²⁰

If there had been a real market for lawyers, there would have been no need, for the Doctor, to “perform an act of duty”, or to assure Renzo that he will not betray him. There would have been no need to remind Renzo, in order for things to pass smoothly, that money *and* obedience were required – money would have sufficed! Even more generally, there would have been no need for Renzo to experience “the timidity so common to the poor and illiterate at the near approach to the learned and noble”, or to bow low to him, or to “learn when to speak; and do not take a gentleman by surprise” – *if* there had been a real market for lawyers, Agnese’s fowls would have bought him the opportunity to speak, and to take the gentleman (if interested in doing business at all) by surprise.

Indeed, the whole description of the social encounter is a perfect account of the kind of inequality, which cooperation based on mutual interest in market exchange should help to cure. Renzo has to beg for the Doctor’s benevolence (at least, Renzo seems to assume this much), and no amount of ‘fowls’ will ever buy the Doctor’s services – the Doctor’s help is off the table, for Renzo, simply because of who he is, and whom he is up against: Renzo is a mere farmer from a nearby village, quarreling with a powerful individual with (but we can only presume this at this point in the novel) very strong political and social connections.

In short: *one* problem seems to be that ability to pay, in it and of itself, does *not* buy legal advice and representation here. The Doctor seems, at best, more like Don Rodrigo’s (and his larger social group more generally) in-house counsel, and it is hard to

²⁰ *Ibid.* at 30

imagine how laws could ever benefit people *other* than Don Rodrigo and his friends, if only *that* kind of lawyers is available, even when laws formally side with the less powerful. Commerce in legal services, it would seem here, might help to make Agnese's fowls *count* in their allocation, help Renzo to secure the Doctor's advice on the basis of a mutual interest; and, finally, it might increase, even if only slightly, the prospects for effective legal protection of Renzo's interests.

5. Conclusion

This chapter explored three arguments on the *dynamic* effects of the markets for lawyers for the protection of equal access to justice. The first two assumed that the market for lawyers can operate close to the norm of perfect competition, whereas the third did not: Market for lawyers might play an important role in 1) easing the pains of the moral choice of complying with the law, especially for the relatively wealthier; 2) patrolling the expansion of the social costs of litigation; 3) steering people away from cooperation in claim-making, based on servile dependency, toward cooperation based on mutual self-interest.

In terms of positive contribution to how we should think about practical reforms in the field of equal access to justice (and in the delivery of legal services and lawyers in particular), this chapter has done remarkably little. Each of these arguments rely on exacting assumptions on the behavioral responses of the users of legal services, which need to be empirically probed a lot more before they can be trusted in political action. Chapter 7 takes up this task and identifies several structural conditions, which should

shake our confidence in using the norm of perfect competition, as an evaluative tool in the market for lawyers.

In terms of negative contributions to how we should approach the problem of reform in the market for lawyers (for the sake of equal access to justice) the chapter accomplishes considerably more. For, whatever the defects that chapter 7 identifies in the existing markets for lawyers, the specific problems which the institution of competitive markets seem to address (namely, providing an incentive for the relatively better off to comply with the law, patrolling the expansion of access needs, and facilitating cooperation in access to justice on the basis of mutual interest) will remain. Which means, in turns, that a competent assessment of the conditions of delivery of legal services in one jurisdiction or the other should include, also, an account of how existing institutions in such jurisdiction address these problems, and evaluate the comparative pay-offs of market reform in meeting them.

7. EQUAL ACCESS TO JUSTICE AND THE MARKET FOR LAWYERS

THREE FAILURES

1. Introduction: The market for lawyers and perfect competition

Chapter 6 concentrated on the static and dynamic effects of perfectly competitive markets in the delivery of legal services and found that the latter might provide, under some exacting conditions, useful incentives to comply with the law, particularly for the relatively better off. Also, competitive markets provide an effective instrument for patrolling the expansion of access needs, and markets in general help to steer people away from cooperation in access to justice based on servile dependency, to cooperation based on mutual interest.

But how confident can we be that markets in the delivery of legal services can actually operate tolerably close to the norm of perfect competition? This chapter argues that we have several reasons to be skeptical about a jurisdiction's ability to effectively institute perfectly competitive markets in legal services – and, thus, we have few reasons to believe that the actual workings of any market in legal services will easily produce the wonders, which we have accounted for in the preceding paragraphs.

Some of the obstacles in actual markets for legal services, and which prevent them from operating closer to the norm of perfect competition (like artificial barriers to entry), are most visible and well known. What's more, they *do* depend on social choice and design, and could thus be reformed (more or less easily) in order to steer the allocation of legal services closer to the perfectly competitive model.

And yet, it is very hard to suppose that, with respect to these failures, a mere market fix (like abolishing restrictions to the provision of legal services) will ever be significant enough to alter the structural conditions, which prevent markets in legal services from consistently approaching the norm of perfect competition.

I call these structural conditions because they refer directly to the nature of the good itself (namely, legal services) that we are allocating, and, relatedly with this, with the kinds of ‘consumers’, which operate in the relevant market. In the following, I discuss three of them: 1) consumption choices in the purchase of legal services inevitably produce significant spill-overs¹ (both positive and negative) to *other* consumers; 2) they

¹ I hesitate to call these externalities, because at least some of them are, by all means, explicitly intended as the *expected* consequences of consumption-choices (and thus enter in a consumer’s utility-function, and contribute to the determination of prices), whereas for many of them the precise identification is quite unclear. Either way, their effects are significant for making the market for lawyers deviate from the norm of perfect competition. Steven Shavell identifies them as externalities proper, and they determine, what he calls, a systematic divergence between private and social incentives to sue (see S. Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 THE JOURNAL OF LEGAL STUDIES 575 (1997)). He might be right, and the identification serves him well in terms of analytic clarity: it is precisely when we understand these as externalities that it is fairly easy to show a divergence between private and social motives to use the legal system. My choice is a more conservative, and hesitant, one, because I try to analytically exploit the fact that consumers in legal services (some of them, at any rate) can *conscientiously* act in ways which produce such spillovers to others in a strategic way – and that rules out the possibility of calling them externalities. This general interpretative question (are these spill-overs or externalities?) is touched upon (although not always explicitly discussed) by many of the classics of economic analysis of procedural law. For example, Landes and Posner’s classic essay (modeling adjudication as a good, whose optimal production and consumptions levels can be generated in a free market, see W. Landes & R. Posner, *Adjudication as a Private Good*, in 8 THE JOURNAL OF LEGAL STUDIES 235 (1979)) discusses ‘spill-overs’, when it ponders on how to model future stakes (especially in precedent-setting) within procedural actors’ utility-functions. They do not discuss lawyers, however, and they end up treating judges and individual parties very differently (the latter do seem to include spill overs in their utility-functions, the former do not). Hadfield’s analysis of the distortions in the market for lawyers concentrates on a very similar set of phenomena, but she doesn’t identify them as either spillovers or externalities – what she tries to do instead is to explain how lawyers can extract rents from corporate clients, thus making market prices approximate wealth, rather than marginal costs. Again, she might be right, but there are two claims here, and I focus on one of them only in the following. First, there is the claim that, *because* of such spillovers (and the dynamics which they trigger, like fool’s games), market prices for legal services end up depending on the wealth of the client, thus moving away from marginal costs. The following analysis here is perfectly compatible (and indeed, inspired by) this thought. The second claim, which Hadfield makes, is that it is *lawyers* (rather than corporate clients themselves), who can strategically exploit this mechanism for their advantage. Again, that could very well be, but the following analysis doesn’t take sides either way, except for stressing the fact that current markets for lawyers typically end up putting corporate clients in a relatively better position to reap off benefits from their consumption-choices, *when compared* to individual clients (notice that this is still compatible with

are made under conditions of uncertainty, which differ greatly on the two sides of the exchange, and which relate directly with the erratic and unpredictable nature of demand for the relative service; and, finally, 3) consumption choices are made by a pool of extremely diverse ‘consumers’, which include both individual actors (itself a very diverse pool), as well as collective aggregations of individuals (and their wealth), like corporations, States or other public institutions.

An even minimally exhaustive analysis of all the possible interrelations and connections between these structural conditions, and of their individual and joint effects on the allocation of the relevant service, goes well beyond the purposes of this essay, as well as the abilities of its author.² So, the plan for this section is to propose *one* tentative way to organize our thoughts around these complex issues, and then, in paragraph 5., to try and consolidate whatever it is that we have learned from this attempt into a solid account on what it is that we should expect from an approach on equal access to justice,

thinking, like Hadfield does, that individual clients with a claim to corporate wealth are in a comparatively better position than individual clients with a claim to individual wealth – my own understanding is that this latter thought depends on very specific institutional conditions, like the existence of group litigation, or of contingency fees arrangements, or both, whereas the first thought is relatively less contingent on particular institutional arrangements). See G. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

² Here I have learned a lot from FREDERICK WILMOT – SMITH, *EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD* (2019), at 69, 70 who directed me to read Arrow, K., *Uncertainty and the Welfare Economic of Medical Care*, 5 AMERICAN ECONOMIC REVIEW 943 (1963). The following analysis is inspired by Arrow’s treatment of medical care, and it attempts at adapting its analysis to the market for lawyers, with minor modifications. Arrow himself saw the analogy between medical care and legal services, and he makes explicit reference to it in his own essay. Oddly, he also quickly dismisses it, however, in order to underscore the uniqueness of the kind of uncertainty, which he detects in medical care. The analysis that follows here doesn’t insist on the analogy between the market for lawyers and medical care, so it doesn’t really take sides on the comparison between uncertainties in the two fields. But I do stress the enormous significance of uncertainties in the market for lawyers. Tom Ginsburg has often made the analogy, in personal conversation, but I have never been able to pick up on it, until Wilmot-Smith directed me to read Arrow. I discussed all these issues with Pietro Biroli, several times and throughout several years. I changed my mind so many times thanks to his criticisms and ideas that I can’t really identify anymore his influence on which specific issue. Usual disclaimers as to personal responsibilities regarding what is actually argued here apply throughout the whole argument.

in order to competently move forward in the adjudication of the relevant issues, and devise reasonable plans for political action and reform.

2. Spillovers in the market for lawyers

‘Consumption choices’ over legal services produce significant spillovers, both negative and positive. The impact of these spillovers on uncompensated costs and benefits is difficult to estimate, as their consequences are, often times at least, presumably intended by the consumer and, thus, should matter for the price that *he* is willing to pay. Problems arise, as we shall see, with how these spillovers interact with both public intervention aimed at limiting them, as well as with strategic behavior by some consumers.

Consider positive spillovers first: the resolution of one case may produce benefits to *other* cases (and to other parties, then) as well, either by setting a favorable precedent, or through general, or special deterrence. Thus, one party’s investments in legal services for her *own* case may end up benefitting other parties as well. These positive spillovers often go financially uncompensated – and indeed, many times it would be hard to think of reasonable ways to financially compensate them at all. It would hard to argue, for example, that members of a previously discriminated minority, who do not participate in the litigation, which declares the unconstitutionality of discrimination against them, are free-riding on reasonable claim-making by others. We would generally say, instead, that they are merely benefitting from what they deserved all along.

Negative spillovers are just as frequent, and easy to spot (what’s more difficult is to determine whether they are compensated somehow, or internalized, and how much, by the consumer). Indeed, in a purely adversarial setting (or, at any rate, in its idealized

version), *any* investment in legal services made by *one* party could be said to produce negative spillovers to the *other* party: the more the final judgment depends on lawyers' efforts, the more investments in the latter (in a binary, win-lose situation) will either end up lowering the other party's chances to prevail, or further increase its expected costs.

The exact size of such negative and positive spillovers (and, crucially, the portion of these which we can compensate, or have the consumer internalize, or not) is, of course, hard to estimate – and it clearly depends on institutional choices and design. Their frequency, however, allows (at least theoretically) strategic consumers to determine their consumption-choices at a given price, *in light of* their influence on the costs (and the benefits), which *other* parties have to burden (or can take advantage from). Ability and willingness to pay might not merely control quantity *individually* consumed at a given price; they might even control the costs and benefits, which *other* consumers have to burden, or can profit from.

Many attempts (either conscious or unreflective) by legal systems to compensate some of such spillovers, typically end up deviating the market from the norm of perfect competition. Here is a list of examples:

a) Limitations to party autonomy, like restrictions to the power to file new motions, or to appeal, can be understood as attempts at limiting the extent to which ability to pay for legal services empowers relatively wealthier parties to impose costs on their opponents (like time, for example: by filing a new motion, or by appealing an unfavorable decision, a relatively wealthier party can postpone a final decision, which it predicts unfavorable, at the expense of the expected winner). Similarly, the attribution to judges of fact-finding responsibilities can be understood as an attempt at limiting the

extent to which ability to pay empowers relatively wealthier parties to price their opponents out, by increasing investments in evidence gathering. Either way, both such interventions are meant to cap (directly, or indirectly) the amount of legal services which parties would be willing to purchase (when they have the ability to do so), if they had the liberty to do so.³

b) In many ways, fee-shifting arrangements (like loser pays all) could be interpreted as compensating (at least some of) the costs (typically, court fees and expenses in legal services), which the winning party suffers, *because of* the ‘consumption

³ It is tempting, but ultimately wrong, to understand this point as a contraposition between so-called adversarial and common law models of judicial proceedings on one hand, and inquisitorial and continental models of judicial proceedings on the other, with the first pair (adversarial – common law) standing for a strong institutional commitment to, and a rather explicit political preference for, the protection of party autonomy, and relatedly, the institutionalization of ‘passive judges’; and the second pair (inquisitorial – continental) standing for a strong institutional commitment to, and an explicit political preference for, the protection of official and public prerogatives, which severely limit party autonomy, and prefigure an active role for the judiciary. It is a tempting, but ultimately wrong, interpretation of the concrete institutional alternatives open to social planners, because the two distinctions are not coextensive. There are plenty of (historical) continental models of judicial proceedings, which do *not* contemplate any active role whatever for public officials (like judges) (on this historical/definitional point, see M. Damaška, *Structures of Authority and Comparative Criminal Procedure*, in 84 YALE L. JOURNAL 480 (1975) and, by the same author, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986)) and, at least in the last fifty years or so, there have been plenty of common law systems, which have witnessed a significant rise in judges’ managerial powers and, consequently, in the latter’s degree of control over the procedure itself, *without* any significant increase in the judicial powers over fact-finding and evidence gathering; see, among the first observations of this institutional tendency, J. Resnik, , *Managerial Judges*, in 96 *Harvard law Review* 374 (1982) and MICHELE TARUFFO, *IL PROCESSO CIVILE ADVERSARY NELL’ESPERIENZA NORDAMERICANA* (1979). This last point (the significant increase, in a few common law jurisdictions, of judges’ managerial powers, without any increase of their powers over fact-finding and evidence gathering), and depending on how judges have decided to use their increased powers, might suggest an interpretation of these institutional developments as ‘market-fixes’, if, for example, judges have been (also) encouraged to use their managerial powers in order to promote settlements over litigation and adjudication. It is important, however, not to lose track of the specific institutional histories, and remember that these ‘market-fixes’ (if one decides to interpret these reforms as such) have been achieved (to the extent that they actually have been) through *non-market* interventions, and within a much richer definition of the ‘overriding objectives’ of reform (beyond, that is, maximization of aggregate consumer welfare). The so-called Woolf Reforms at the end of 1990s in the UK provide a good illustration of these points, and, consequently, an extremely valuable social experiment for the evaluation of the effects of these ‘market-fixes’ on the accessibility of the administration of justice as a whole, and on the market for lawyers (and its fairness and efficiency) more specifically; for one influential (and fairly skeptical) evaluation of this entire strategy (and of its effects), by someone who was involved, head on, in its formulation see Zuckerman, A., *Civil Litigation: A Public Service for the Enforcement of Rights*, 26 CIVIL JUSTICE QUARTERLY 1 (2007).

choices' of the losing one.⁴ But as they raise the expected costs of losing, fee-shifting arrangements provide strong incentives to rational *overinvestment* in legal services: in an adversarial environment, any investment which marginally increases the chances of winning, justifies a symmetrical investment by the other party, well beyond the value in dispute itself – until one party is either priced out, or simply gives in.⁵

c) The institution of aggregative mechanisms in litigation (like the class action device) could also be understood as a way to compensate active parties (and their lawyers, especially) of the positive spillovers that they produce to the other parties in the class, or group. Conversely, group litigation also enables plaintiffs to protect themselves from the negative spillovers that relatively wealthier defendants can impose on them. But the institution of group litigation necessarily imposes limits to the autonomy of parties, directly excluding, for example, the marketability of individual participation itself for absent class members. Even more oddly, the institution of group litigation typically advises further institutional reforms (like the introduction of contingency fees arrangements for the financing of litigation), which transform lawyers, like any other entrepreneur, even more into arbitrators of litigation risks. So, spillovers in the market for legal services seem to justify and call for, in this case, *both* pervasive limitations to the market of legal services itself (by limiting the scope of individual representation at trial), as well as further market expansions in the very activity of providers (lawyers, that is).

⁴ For a detailed discussion of the pros and cons of such arrangements (and their possible adaptations and modifications) in the English context, see Zuckerman, A., *New Rules for Costs Capping Orders: Feeding the Costs Litigation Frenzy?*, 28 CIVIL JUSTICE QUARTERLY 1 (2009).

⁵ See G. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000), illustrating the frequency of fools' games within investment decisions in legal services.

3. Uncertainties about law

The law is a fairly complex business. The cynic might not find it entirely surprising that law professors and lawyers more generally have been telling each other and themselves this much for a long time. But the thought does track common observations even among non-lawyers, and thus among people who have no interest in showing off the value of what they know and do.

For example, it is very common to find that a good portion of the general population typically fails to identify the legal relevance of even their *own* problems.⁶ Which could either mean that law professors and lawyers are right – it takes a special, and very hard to acquire, expertise to even identify specific problems as legal ones. Or, it could mean that a good portion of the general population systematically decides *not* to invest in acquiring even a minimal level of legal expertise and knowledge. (Or it could mean both things at once, of course).

Both observations make law, and legal services, the quintessential *credence* good. There is a group in most modern and contemporary societies, which is knowledgeable about the law; and advises the rest on what to do, and expect about, and on how to evaluate, the law.

Furthermore, both observations (and their implication) make a lot of sense as we inquire about two very visible sources of uncertainties about the law and legal services:

a) The law and legal services are an uncertain ‘product’, in the sense that there are fundamental uncertainties in the very evaluation of their impact on relevant outcomes. We not only have difficulties in knowing *what* exactly determines the outcome of any

⁶ REBECCA SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (2014).

legal case (indeed, legal theory itself has, famously, tremendous difficulties in answering this question), but *any* outcome in law lends itself to first order political and moral evaluation. Minimally, this means that even the best legal minds in any given society will have a lot of room to argue and debate about any admissible criterion with which to evaluate the quality of the ‘product’, which legal services produce;

b) The law and legal services are an uncertain ‘product’, in the sense that they are a useful tool for the satisfaction of needs, which are erratic and unpredictable in origin. For one thing, legal needs are subject to exogenous shocks, like the enactment of new laws (either substantive or procedural), or the abolition of old ones. Any substantive law which authorizes new claims, or any procedural reform which empowers new parties to bring cases to court, create at least the possibility of significant shifts in the demand for legal services. But even more generally, the need for legal services typically implies a departure from the normal, or average, or habitual, state of affairs, and *presupposes* the occurrence of an unpredictable event. Certainly, risks could well depend on, and be (at least partly) endogenous to, personal choice and behavior. But these risks are hardly marketable (and notice that this is true for *both* defendants and plaintiffs), and they are particularly costly too.

Again, notice that a host of social responses to these systematic deviations from the norm of perfect competition typically causes the market for legal services to deviate even further. Consider artificial barriers to entry in the profession first. Traditionally, these are justified as a tool to guarantee quality and adequate performance in the presence of informational asymmetry in bargaining conditions between lawyers and their clients.⁷

⁷ Artificial barriers to entry in the profession are not the only possible response to law’s complexity, and to the fact that legal services are a credence-good. If the fact that law is *seen as* a complex business can be

But as they attempt to do so, they deviate the market for lawyers from the norm of perfect competition even further, as they directly restrict competition and meddle with prices.

Second, consider another traditional response to uncertainties in the evaluation of the impact of law and legal services on relevant outcomes. Law itself could be understood as a *response* to uncertainties in the evaluation of the relevant outcomes of social action and choice. Instead of deciding at each and every turn what's best for us to do, we collectively establish, through a particular kind of convergent practice, the social grounds of legal validity. Whichever directives such social grounds identify as binding on us, we identify as valid laws, which we ought to follow. On the one hand, this greatly eases the burden of deciding in a significant large portion of social behavior. On the other, it separates out these 'social grounds of legal validity' as a, possibly, *autonomous* body of social thought and discourse (indeed, that's the whole point of the operation). This much is enough to establish the social conditions, which permit the rise of a specific social group, which is in charge of knowing something about the law, and of advising the rest about what to do, and expect about it.

4. Fragmentation in the market: the gulf between corporate and individual clients

Gillian Hadfield argued that:

The largest firms serve almost exclusively corporate clients. The most successful, influential and creative lawyers predominantly serve corporate clients. The vast majority

explained by the fact that a portion of the population systematically underinvests in legal expertise and knowledge, because the costly, and erratic, nature of legal needs makes it rational to do so, then another reasonable response could be direct public investment (to compensate for private underinvestment) in legal expertise and knowledge for *that* segment of the population (many countries do, in fact, in a sense, publicly invest in legal knowledge and expertise by offering law degrees in public universities, but then typically do not attempt at restricting its pay offs to any particular segment of the population – partly because it would appear to be extremely difficult to do so in any reasonable and effective way).

of elite law school graduates end up serving corporate clients. Commercial clients command a huge fraction of legal effort, effectively squeezing the interests of individuals, particularly their most precious and democratically vital interests to the margins.⁸

Hadfield is referring here to the US market for lawyers and, accordingly, in order to justify her claim, and her own reconstruction of the wider distortions that such fragmentation in the market for lawyers causes to the very *price* of law, she quotes relevant (and quite unambiguous) data from the US. But there is very little reason, however, to doubt that a similar phenomenon (or, a similar set of phenomena) either has *already* happened, or is happening, in *other* jurisdictions as well.

If we divide the world into personal and business clients, personal and business legal matters (as empirical research confirms we confidently can), it is immediately important that these client groups fundamentally differ in terms of their command of wealth. For it is the wealth of the business client group that ultimately determines pricing in the market(s) for lawyers. Driven by corporate demand, backed by corporate wealth, the legal system prices itself out of the reach of all individuals except those with a claim on corporate wealth.⁹

So, according to Hadfield, it is corporate clients' command of wealth (not marginal cost), which determines prices in the market for lawyers, thus pricing out a large portion of individual clients from the benefits of legal services. But we can now add: the two structural conditions (spillovers, and uncertainties about law) reinforce the fragmentation in the market for lawyers, and are further reinforced by it in turns. Together, these three factors make the possibility of pushing the market for lawyers closer to the norm of perfect competition through efficiency gains a very daunting task indeed.

Let's begin with the uncertainties about law. Corporate clients presumably have well defined, and fewer (not in quantity, but in variety and diversity), interests than

⁸ G. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000)

⁹ Ibid.

individual clients. Moreover, the risks, which corporate clients have to face when they interact with laws, are marketable, or more easily marketed than the corresponding risks of individual clients: Corporate clients can change, at a cost, their area of business, or reform their constitutive make-up in a much easier way than individual clients can do so. Long term, well-defined interests, and marketability of risks, ease the evaluative burden, as they allow for experiential learning across different cases and scenarios; and, thus, they reduce the fundamental unpredictability of legal needs.

Long-term interests, marketability of risks and evaluative confidence, in turns, jointly put corporate clients in a comparatively better position to exploit the strategic advantages of ability to pay on the imposition of negative spillovers to others, or on the extraction of positive ones from others' consumption choices. So, it is not *just* that corporate clients are more able to pay than individual ones. They are even in a comparatively better position to make their superior ability *count* in strategic planning.

5. Conclusion

It would seem then that we need to reconcile ourselves with the idea that markets in legal services systematically deviate from the norm of perfect competition, and that public intervention (even when it provides apparent fixes to such deviations) typically make them deviate even further away. The observation bears direct (albeit negative) evaluative consequences. For example, the two arguments, which we discussed, on the attractiveness of markets in legal services, immediately begin to lose much of their weight, the moment we start to account for systematic deviations from the norm of perfect competition.

Consider the argument from efficient compliance and deterrence first. Markets might make compliance with the law a more palatable choice for the relatively better able to pay for legal services – as ability to pay increases the value of the legal option, compared with self-help. For all the rest, however (and all the more as we move closer to those who are *not* able to pay for legal services), markets might make investment in the legal option either irrational (depending on one's propensity to risk, unpredictability of need might well advise to play the odds and underinvest in legal protection), or an extremely complex endeavor (since uncertainty about outcome evaluation, as we have seen, cuts across a good portion of the demand for legal services), or *both*.

The argument for market discipline, on account of the 'ever expanding frontier hypothesis', loses much of its grip too. We can discipline the imposition of *some* costs with markets, to be sure; and we can have users pay for *some* of them. But, at the same time, we *also* authorize the imposition of costs to *others*, and authorize free riding on the latter's expenses. It is hard to imagine, at *these* conditions, how markets alone could *ever* efficiently patrol the expansion of the frontier.

So, what to do? Reconciliation with a brute fact (the existence of significant, and hardly recoverable, deviations from perfect competition in the market for legal services) doesn't take one very far, in it and of itself, in terms constructive proposals for reform. Let us move slowly and tentatively, then; and begin by making a wish list for a reasonable approach to equal access to justice. *Given* the systematic deviations in the market for lawyers from the norm of perfect competition, what should we demand from an approach to equal access to justice, in order to competently evaluate practical action in response to them?

First, one way to reduce spillovers (both positive and negative) is to impose institutional limitations to personal choice and discretion in individual use. We limit the production of negative spillovers, or free riding on the expenses of others, by limiting people's discretion to choose the quantity of legal services, which they would have been willing to purchase otherwise. This means that if we *also* wish to protect individual choice and empowerment, we need to provide an account of how to reconcile the latter with limitations on personal control and discretion in litigation choices. Chapter 13 (on group litigation) takes up this task and proposes a way to affect such reconciliation: we can justify limitations to personal control and discretion in litigation choices *for the sake of* protecting individual choice and empowerment, by guaranteeing that the combined capabilities of individual users are adequate to the task of protecting their social equality, of increasing the epistemic capacities of public institutions, and of expressing a democratic culture in dispute resolution.

Second, if we cannot really get rid of spillovers, then what we need to know is when (and for which benefits exactly) we should authorize free-riding on the expenses of others, just as well as when (and for which costs exactly) we should authorize the imposition of costs to others. This is the point of grounding demands in equal access to justice on a social duty. Chapter 10 provides a tentative illustration of a general method for identifying the 'spillovers' (both positive and negative), which we should expect to tolerate in access to justice, by analyzing the relation between the concept of 'capability' and the duty to, at times and provisionally, pause, cool down, and listen.

Third, the significant effects of uncertainties about the law on the markets for legal services, suggest that we should study, and give an account of, the concrete

cognitive abilities, which people develop, as they learn about the law. And then, we should study the effects of the acquisition of such cognitive abilities on the protection of relevant goods. *What* changes (if anything changes at all) when people acquire knowledge about, and practical expertise with, the law? And how costly is it? The remainder of this essay doesn't address this problem, but chapter 9 takes a closer look at empirical approaches to access to justice and further elaborates on the potentialities of a CA to integrate their insights to move forward on these questions (and others). Also, one of the political principles on equal access to justice, which chapter 11 proposes, understands access to justice as an instrument to protect the epistemic capacities of public institutions, and it is meant to underscore the importance (for equality in access to justice) of understanding law from the point of view of the cognitive abilities of its subjects.

Fourth, the plurality of consumers and, particularly, the loud presence of corporate clients, call for an account of equality, which should move beyond wealth distribution (since corporate wealth is an aggregate of individual wealth).¹⁰ What we need is an account of inequality, which focuses on the effects of consumers' differential abilities to protect themselves from the negative spillovers, which others impose on them; as well as of their differential abilities to free ride on the legal expenses of others. Relatedly, we need an account of inequality, which focuses on the effects of consumers' differential abilities in protecting themselves from the uncertainties in outcome evaluation, and in the prediction of need. Chapter 11 proposes three political principles, which, I argue, provide the demands of equality in access to justice with reasonable content, beyond equal distribution of wealth. This essay does not discuss, however, the

¹⁰ For this observation, see G. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

problem of how to organize the fair coexistence of corporate clients in particular with all the rest of consumers of legal services, within the market for lawyers. Chapter 13 (on group litigation), as well as chapter 14 (on the permissibility of confidential settlements), discuss, *inter alia*, the problem of finding reasonable institutional responses to parties' differential abilities to either protect themselves from negative spillovers, as well as free-ride on positive ones.

Fifth, and finally, for all the skepticism regarding the expectation that *any* real market in legal services' will *ever* approach the imaginary ideal of perfect competition, one argument, which we discussed, on the possible virtues of markets, has been left virtually untouched. This is the argument, which attempted at identifying broader transformations, which reliance on mutual self-interest in social cooperation could affect, in the behavior of the relevant actors. Since the argument doesn't depend on markets' ability to efficiently allocate anything at all, their systematic deviation from the norm of perfect competition is no reason to disconfirm it.

So, what *could*, instead, confirm, or disconfirm, the argument?

One critical issue seems to be to determine whether law is, in fact, a credence-good. And, if it is, what it is that we can do to reform its status. If law is a credence-good (and if there is little that we can do about that), then cooperation based on mutual interest might not be enough to protect oneself against servile dependency on the goodwill of others. Again, this means that any reasonable approach on equal access to justice needs to study, and give an account of, the concrete cognitive abilities, which people develop, as they learn about the law.

Another critical issue seems to be to determine whether there is any feasible alternative, in access to justice, between addressing ourselves to the self love of others, or to their benevolence. Cooperation based on mutual interest in market exchange (and mutual interest alone) does seem attractive, so long as its only alternative is servile dependency. This means, also, that a reasonable theory on equal access to justice should be able to give an account of, and comment on, *which* social attitudes we can express, and how, when we allocate legal services. Chapter 12 analyzes different institutional models for the delivery of legal, *also* on account of their respective effects on people's ways to address themselves to the problem of finding help in legal advice and representation. Chapter 15 analyzes the complex interactions between legal and extra-legal activism in one important moment of the American civil rights movement, and speculates on the different practical attitudes, which due process might be able to call out in its participants, within the larger context of reformist social movements.

8. THE NEED FOR A THEORETICAL BASE: FOUR ARGUMENTS

1. Introduction.

Chapter 1 began by discussing a human rights approach to equal access to justice and showed the important role, which specific access rights play in several core human rights treaties. Chapter 2 further elaborated such discussion, by presenting three interpretations of equal access to justice – equal access to justice as equal legal protection, as equal standing in open court, and access to justice as agency in legal affairs. Then, chapter 3 and 4 discussed the possible contributions of these interpretations in the analysis of two practical problems in equal access to justice – namely, the relevance of the distinction between the criminal and civil domain in the allocation of the right to counsel and the basis for the recognition of a categorical right to self-representation at trial.

Chapters 5, 6, and 7 discussed a market-based approach to equal access to justice and speculated on the possible contributions of markets in general to equality in access to justice, as well as the value and reach of the norm of perfection competition as an evaluative tool for analyzing the effects of the market for lawyers in the delivery of legal services.

We have thus set the stage for a normative evaluation of historical arguments on equal access to justice. What's the basis of Governments' commitments in the administration of justice?

The chapter studies four arguments in particular. First, the value of equal access to justice, this chapter argues, could be understood as an implication of the ideal of

government by consent. If a necessary condition for the legitimacy of a legal order is tied to the kind of consent, which it receives from its subjects, then systematic asymmetries in the application of laws, which are not explicitly contemplated by the valid legal material in the relevant jurisdiction, could be seen as a violation of the requirement of consent. Unequal access to justice amounts to a fraud, perpetrated by a Government, for the benefit of some its citizens, to the exclusion of all others. According to this argument then, Governments have weighty commitments in the administration of justice, because these commitments should be understood as a condition for their very legitimacy.

Second, the value of equal access to justice could be understood as an idealization of adversary proceedings in adjudication, as the best (or standard) method for dispute resolution. Having equal access to justice means that one has acquired a particular social status in claim-making under the law, and that one has been granted the institutional capacity to stand against one's adversaries, in front of an audience of one's peers. According to this argument then, Governments have weighty commitments in the administration of justice, because they are committed to a particular form of handling disputes between private citizens and private citizens and public authorities. It is, thus, the adversarial nature of adjudication and law enforcement, which triggers Governments' commitments in access to justice.

Third, equal access to justice could be understood as a welfare-right – that is, as an entitlement on claim-making under the law, which should complement broader institutional transformations in the mechanisms of resource-distribution in a given society, and which is itself designed to protect or maintain fair patterns of resource-distribution. According to this argument then, Governments have weighty commitments

in the administration of justice, because they are committed, also, to guaranteeing fair distributions of the social product among the relevant population: it is Governments' commitment to the protection of distributional equality among its legal subjects, which triggers their commitments in protecting equal access to justice.

Fourth, the value of equal access to justice could be understood as implicated by the ideal of the rule of law. That is, equal access to justice could be seen as an essential component of what it means, for Governments, to generally abide to the principles of the rule of law. According to this argument then, Governments have weighty commitments in the administration of justice, because they are committed to protecting the rule of law.

Each of the received arguments provides important insights on how to understand the value of equal access to justice. Also, each of the argument makes abundant use of, and explains or refines, one or more of the three interpretations of equal access to justice presented in chapter 2. And yet each of them fails because neither one can provide a coherent and systematic understanding of all three of such clusters of concepts.

2. One introductory argument on the point of equal access to justice

There is a rather easy narrative that purportedly justifies a concern with equality in access to justice. If laws or other regulations are said to be *rightly* binding for the activities and interactions of a given community in so far as, and to the extent that, they can be shown, either explicitly or by implication, to have been consented to by the members of such community, then any systematic *asymmetry* in the concrete application of such laws, which is not *explicitly* contemplated by valid legal material in the relevant jurisdiction (so that, contrary to what the laws of such community promise, one class, or group or mere

collection of individuals, is systematically excluded from the possibility of successfully invoking the protection of law) can be easily shown as a violation of such consent – and, as such, as a violation of the very ground on which the authoritative force of laws is said to be based. A community that attributes, on paper, rights as well as duties to its citizens, but then systematically denies access to justice to some of them is thus committing, quite simply, a *fraud* – breaking the fundamental promise upon which it asked compliance with its own demands in the first place. On this view, then, the legal entrenchment of equal access to justice can be seen as directly *instrumental* to the concrete enactment of ‘government by consent’, by ensuring that everyone has an opportunity to invoke, and not only be at the mercy of, the authoritative force of law.

And yet, notice that the invocation of the ideal of ‘government by consent’ falls far too short of the task of providing a successful justification of many, if not most, of the actual programs that have been crafted for delivering equal access to justice for all.

Consider, for example, the following remark by Lew Uhler, then the Governor’s State Director of the Office of Economic Opportunity for California (and now President and founder of the National Tax Limitation Committee) explaining Ronald Reagan’s (then Governor of California) attempt to veto (ultimately unsuccessfully) the allocation of funds to the California Rural Legal Assistance Program:

Why should we pay the salaries for a lot of guys to run around and look up rules so they can sue the state? The most a poor person is going to need a lawyer for is some divorce problems, some bankruptcy problems, some garnishment problems. What we’ve created in CRLA is an economic leverage equal to that existing in large corporations. Clearly, that should not be.¹

¹ I found this citation in M. Abram, *Access to the Judicial Process*, in 6 GEORGIA LAW REVIEW 247 (1972).

Leaving aside the rather obtuse statement on ‘what the poor needs the law for’ (which would invite, perhaps contrary even to Uhler’s real intentions, the creation of ‘a law for the poor’ as opposed to, and neatly distinguished from, ‘a law for everyone else’), it isn’t difficult to articulate Uhler’s underlying concerns in a way that could successfully challenge any ambitious, and expensive, program (like the CRLA certainly was) in the field of access to justice (when, and to the extent that, we are not authorized to appeal to anything more than the ideal of ‘government by consent’).

First, notice that Uhler’s most explicit concern seems to be about the rather peculiar nature of any *public* investment in access to justice – which is one, that is, that only promises *more* costs for the public purse (both directly, since trials are costly; as well as *indirectly*, since the result of trials might be very costly too, possibly requiring the award of damages, or even structural reforms of one public institution or another), rather than future gains. At minimum, an investment that by definition promises even *more* costs in the future ought to provide a very strong theory about its benefits to gain credibility.

Second, investment in access to justice raises a rather common (and much debated) concern with the legitimacy of courts, as concrete avenues for institutional reform – especially when their reformist activity is solicited by ‘cause-lawyers’, whose political agenda typically *doesn’t* receive support from a popular vote, and not even from a popular political movement (recall Uhler’s basic question, why should California “pay the salaries for a lot of guys to run around and look up rules to sue the State?”). In sum, the very idea of ‘government by consent’ would, at best, either make the enactment of expensive public programs designed to increase accessibility dependent on the will of the

ruling (and contingent) majority of the day (or, of course, on the generosity of charitable individuals or organizations), or even impede the former entirely: it is precisely *because* democratic states should enact the preferences of the contingent majority of the day (whenever such preferences are properly formed and aggregated by legitimate procedures) that we should *not*, as a community of individuals constituting a self-governing people, invest in access to justice. Contrariwise, the normal consolidation of political majorities over issues that deserve public scrutiny and concern would easily become hostage to the (publicly financed) activities of a handful of lawyers with no paying clients but with an idiosyncratic and unpopular (from the point of view, perhaps, of *both* the majority and repressed minority) ‘cause’. Expensive programs, which are designed to protect equal access to justice, no matter how privately beneficial for the individuals they are meant to serve, shouldn’t be regarded then as an imperative of justice – that is, as a side-constraint imposed on everyday political bargaining, constituting the minimal content of the legitimate consent of the governed.²

3. Three further arguments on equal access to justice: limits and insights

At times, the recognition of some foundational aspects of the access to justice (like, for example, the right to legal representation) is justified by appeals to powerfully idealized versions of so-called *adversarial* proceedings of adjudication.³ Equal access to justice,

² There are two different issues, which I am blurring together here, but which should be kept apart. First, the CRLA was meant to extend public commitments in equal access to justice even in non-criminal domains. Second, it was authorized to initiate collective procedures, like class actions. The first issue (allocation of public funds to non-criminal cases as well) doesn’t seem to raise legitimacy concerns. One big concern, rather, is with the significant increase of costs, which public support in civil cases would cause. The second issue does raise legitimacy concerns, but regardless, I would submit, of where exactly funds, which finance class actions, come from.

³ The over-reliance on the importance of the value of party-autonomy is reflected, for example, in the narrow understanding of equal access to *justice* as merely equivalent to a right of access to *lawyers* where

according to this view, is interpreted in two ways: either as an aspect of one's agency in legal affairs generally, and in litigation in particular and, as such, as reflecting the value of party autonomy in adjudicative procedures; or, it is interpreted as an aspect of one's *standing* in a community of equals. In this case, equal access to justice means to be able to *stand* as equal in front of all other members of the community, to *speak* up competently and with no shame, and be *heard*, in one's claims and defenses. In both these narratives, all that anyone needs is a *chance* to rebut whatever one's opponent has claimed, a jury of one's peers, and a passive and oracular umpire that silently administers the rules of the 'game'.

Other times, equal access to justice follows from support to the constitutionalization of so-called welfare rights. Here, equal access to justice is seen as an instrument that should complement broader institutional transformations in the mechanisms of resource distribution, and which is designed to protect or maintain fair patterns of resource distribution.⁴ Finally, and most recently, equal access to justice began to appear as an essential element, or an aspect of, one or more of the foundational principles of the rule of law.⁵

the provision of the latter would automatically deliver an acceptable realization of the former. For a classic (theoretical) analysis of the difficulties and contradictions within this last point of view, see R. Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, in 1 LAW AND POLICY QUARTERLY 5 (1979).

⁴ See Mattei, *Access to Justice: a Renewed Global Issue?*, in 11 ELECTRONIC JOURNAL OF EUROPEAN LAW, (2007): "the first wave of writing [on the theme of access to justice] historically precedes the so-called Reagan-Thatcher revolution, the moment at which public institutions started being transformed and significantly privatized. Cappelletti's work, in particular, witnessed a moment of general optimism in the public interest model, an idea of an activist, redistributive, public-service minded approach, to the private sector in general and to private law in particular. In this intellectual mode of thought, the Welfare State in Welfare Societies was seen as a point of arrival in civilization, and access to justice was seen as a device through which communities could provide law as a public good, after having provided shelter, health care and education to the needy".

⁵ See, among many, MICHAEL TREBILOCK, RONALD DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT* (2008), at 236 – 252; see also JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY*, (1979), at 217.

Take, first, the argument flowing from an interpretation of the value of party autonomy, which interprets some constitutive parts of the right of access to justice in close connection with an idealization of strictly adversarial proceedings, and, as such, as an aspect of people's autonomous agency against external coercion.⁶ Clearly, the argument has, indeed, much to tell us, particularly in the field of criminal proceedings – that is, whenever someone is involved in a legal proceeding which threatens her personal liberty, say, through incarceration or some other form of imprisonment. And yet, no unqualified invocation of the principle of party-autonomy could tell us anything specific about the broader content of equal access to justice itself, as we have already seen, especially whenever the most troubling barriers to its implementation do not reside in an overt coercion of someone's freedom, but, rather, in the concrete (economic, social or a contextual combination of both) obstacles that effectively hinder his real opportunities to invoke and mobilize the formal machinery of justice, in order to pursue or protect goals he values.⁷

⁶ See, for example, *Gideon v. Wainwright*, 372 US 335 (1963), which famously qualified the right to counsel to the indigent criminal defendant as an essential component of the adversary system of litigation as a whole.

⁷ The idealization of the value of so-called adversarial proceedings (as opposed to so-called inquisitorial proceedings) in producing accurate, fair and equitable results, has been forcefully criticized by much of the comparative literature on procedural law in the past thirty years or so. For two classic arguments against both the descriptive value of neatly sorting out adversarial proceedings as opposed to purely inquisitorial ones (especially in the field of civil justice), as well as the normative disadvantages in the overreliance on some aspects of so called adversarial proceedings (like parties' exclusive control over the production of evidence, and the mere passive role of judges in administering the proceedings themselves) see TARUFFO, MICHELE, *IL PROCESSO CIVILE ADVERSARY NELL'ESPERIENZA NORDAMERICANA* (1979); and J. Langbein, *The German Advantage in Civil Proceedings*, in 52 *THE UNIVERSITY OF CHICAGO LAW REVIEW* 823 (1985). Many of the (mainly theoretical) arguments put forth by Langbein in identifying the 'German advantage' (focusing on specific procedural aspects which, like a more active role of judges in gathering evidence, may have an impact also on people's access to justice), seem to have been partially confirmed by a recent empirical research, carried out by the World Justice Project in 2016, which places Germany in a comparatively good position with respect to the delivery of access to civil justice (*WJP Rule of Law Index 2011-2016*; see also the material available at <http://worldjusticeproject.org/rule-of-law-index>). I stress that this is only a *partial* confirmation, because, of course, the Index itself does not allow one to sort out the exact contributions of different procedural arrangements to the production of the particular outcomes captured by the Index. A possible counter-example to Langbein's famous arguments (and, correspondingly,

Similarly, the ideal of equal standing in public confrontation (which is, again, strictly connected with the idealization of adversarial proceedings as the best method for producing fair and accurate decisions) has much power and purpose. Notice, for example, where it directs our attention in conceptualizing access to justice. If access to justice means *standing* in some peculiar relation, grounded in one's equality with all others, with one's 'adversaries', then the equal of access to justice is an aspect of one's equality with all others in social relations more generally— it is an aspect, that is, of what it means to *stand* in public without shame, as well as what it means to *contribute* to, and *share* the results of, social enterprises. And yet notice how remarkably little the standard models of adversary proceedings tell us about where to look, and how to evaluate, the *actual* social relations that one enters in when pressing her claims to the law. Not in all of one's encounters with the 'law', there is an adversary that one can be compared with. At times, the adversaries are not of the same *kind* (say, a not for profit corporation and a group of individuals, or a corporation), making it difficult even to think of meaningful comparisons. Furthermore, one does not need to, literally, stand up to be equal to everyone else, or to speak up to be heard, or to be heard by anyone specifically to make her voice count. At times, all one needs is the respect that grants standing even when one stays seated, voice even when one does not articulate thoughts with spoken words, and relevance even when one stays silent.

a good example that there might be something *else* going on – apart from procedural rules, that is – that explains the German advantage) offered by the data produced by the *WPJ* is, as it happens, the Italian procedural system, which is indeed similar to the German one (or, at any rate, much more similar to the German procedural system than the American federal one) and, yet, performs rather poorly (along many dimensions, including access to justice) – apparently, even more so than the US. I was told by Langbein (in a personal conversation in Dubrovnik in May 2011) that this result was indeed anticipated by Mauro Cappelletti, while commenting (in an informal occasion at Stanford in the mid-eighties) on a draft of Langbein's famous article.

In fact, most continental European countries have followed a somewhat different strategy for expanding the coverage of the right of access to justice. There, the institutional of equal access to justice has largely proceeded side by side with the broader development of the Welfare state, both as a general practice of governance, as well as a constitutional requirement of contemporary democracies. On this reading, access to justice is typically seen as a guarantee, for all citizens, that the benefits promised by laws actually reach the intended beneficiaries, who can, in any case, claim the former in courts.⁸ And yet, it does not seem possible to merely *juxtapose* institutional protections of equal access to justice to the constitutionalization of welfare rights generally. On the contrary, one of the traditional arguments *against* such endeavors is precisely the supposed un-justiciability of so called socio-economics rights.⁹ That is, one of the problems with these rights is that, notoriously, they are difficult to enforce, through courts. In sum, it is the *lack* of access to these rights through courts that plays against the substantive recognition of their claims.

Also, if equal access to justice is included in the category of welfare rights, then welfare rights cannot be seen only as rights to a fair pattern of distribution of divisible goods: the focus on access to justice (and, correspondingly, the requirements that the recognition of a right of access to justice may produce over the actual distribution of divisible goods in a given society) inevitably points (as I have just remarked), more

⁸ For the classic exposition of this view, see CAPPELLETTI MAURO & BRYANT GARTH, *Access to Justice: the Worldwide movement to Make Rights Effective – a General Report*, in ACCESS TO JUSTICE: A WORLD SURVEY, VOL. 1 (MAURO CAPPELLETTI, GARTH BRYANT eds., 1978)

⁹ For a classic summary of these arguments (and a good number of persuasive rebuttals), see F. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT’L J. CONST. L. 13 (2013); for a recent update, together with a case study of Columbia, see D. Landau, *The Reality of Social Rights Enforcement*, in 53 HARVARD INTERNATIONAL LAW JOURNAL (2012), at 189.

inclusively, to the *nature* and *kinds* of social relations between individuals or between groups, in any domain (both public or private) in which they live their lives.

Finally, consider the argument, which sees equal access to justice as an essential component of the rule of law. Again, it would be hard to deny, for example, the intimate connection between equal access to justice and the principle of equality before the law, which is often recognized, in turns, as a foundational principle even within so called *thin* definitions of the rule of law. In this sense then, equal access to justice, as long as it participates to the definition of what it means to be equals before the law, can be easily seen as a requirement of the rule of law itself. Indeed, the general, and often unspecified, ‘accessibility’ of courts typically figures among the essential elements of the rule of law. Still, some difficulties immediately arise. For one thing, any serious, and empirically accurate, analysis of equal access to justice is bound to show that very few of the countries, which are said to abide by the broad principles of the rule of law, actually meet even the most minimal demands of equal access to justice for all. Thus, we might, perhaps, expand our understanding of the principles of the rule of law in such a way as to include an explicit recognition of equal access to justice (so that the latter could be seen as flowing from an expanded definition of the former), but we could only do so at the risk of losing much of the former’s current descriptive use and scope.

It is not difficult to find definitions of the rule of law that allow to make *some* room for the motivating concerns behind the institutional protection of equal access to justice, however. Take Rawls’ one: If the principles of the rule of law include, first, an understanding of legal authority as a system of “coercive orders of public rules”; and, second, the requirement that similarities in the merits of legal cases should track

similarities in their legal *outcomes*, as a fundamental constraint for the discretion of judges or other public officials in the exercise of legal power – Then *equal* access to justice for *all* is the assurance that legal rules can effectively constitute “grounds upon which [*all*] persons can rely on one another and rightly object [*in virtue of their equality among one another*], when their expectations are not fulfilled”.¹⁰

But no merely *formal* account of the rule of law is going to tell us enough about how we should proceed to identify people’s unmet legal needs, the challenges they face in trying to meet them and the kind of loss they experience when they fail to do so. Put differently, the focus on access to justice requires one to look beyond and outside the formal institutional configuration of adjudicative procedures in one country, to include a broader perspective on the different avenues and strategies by which people actually activate or mobilize their formal legal rights (or, even more broadly, their *informal* grievances and claims, transforming them into overt disputes), and the motivating concerns that explain such mobilization or activation.

In sum, the central concern with equal access to justice is, essentially, a concern about particular social *outcomes* (evaluated in terms of the *actual* protection or expansion of people’s substantive freedoms and opportunities for meaningful agency and empowerment), which are obtainable, given a certain institutional structure and a particular pattern of human behavior. If this is indeed the ultimate objective (an outcome-based evaluation of people’s real opportunities of mobilization and activation of their formal rights and claims), the approach itself should say relatively little, at the beginning, on the particular institutional configuration that a legal system may or may not display

¹⁰ JOHN RAWLS, A THEORY OF JUSTICE (*Revised Edition*, 1999), at 207.

and, rather, *test* how different institutional formats may help or hinder the concrete realization of such outcomes.

4. Conclusion

Each of the received arguments provides important insights on how to understand the value equal access to justice. Furthermore, each of the received arguments makes abundant use of one or more of the three interpretations of equal access to justice, identified in chapter 2. And yet each of them fails because neither one can provide a coherent and systematic understanding of all three of them.

The ideal of ‘government by consent’ highlights the relation between access to justice and the legitimacy of legal authority. The argument bites because it tracks a common intuition on the importance of guaranteeing the desired correspondence between the ‘rules as announced’ and the ‘rules as applied’ (this is the first interpretation of equal access to justice).

And yet the argument ultimately fails because it has comparatively little to say on the relation between the ideal of equal standing in open court (the second interpretation) and the ideal of equal *social* standing in general. Recall Uhler’s question: ‘who are these lawyers?’. Granting *better* standing in courts of law to previously excluded individuals or social groups, or any other being, might mean (as a matter of unintended but hardly avoidable consequence, at least at present conditions) that we are *also* granting more powers to one (more or less) specific social group, to intrude on the decisions of elected officials – namely, professional lawyers. But how could this square with the ideal of

‘government by consent’, since no one elects lawyers, and the latter clearly are *not* anyone’s political representatives?

The idealization of adversarial proceedings makes one see, through the ideal of equal standing in public confrontations, the close connection between access to justice and the ideal of equality in social relations, *and* illuminates the value of protecting human agency in processes of adjudication and dispute resolution. This is a sensible refinement, and reasonable use, of the second and third interpretations of equal access to justice, which we discussed (the ideal of equal standing in open court, and the ideal of agency in legal affairs). And yet the argument fails because it doesn’t tell us much on how these two ideals should connect, and be informed by, the first ideal (namely, the ideal of equal legal protection). *If* we can assume roughly equal standard conditions, the argument works: two parties with roughly equal powers to litigate tend to produce accurate findings of law and fact. Whenever we cannot assume roughly equal standard conditions, however, the argument might even make matters worse, by forcing us to identify the relatively more vulnerable as deviant, rather than to call directly on the injustices perpetrated by the relatively more powerful (and by public authorities). Recall Sutherland’s ‘young, illiterate and ignorant negroes’ in *Powell*, who have been attacked by a group of (clearly incompetent) whites, *and* by an (far more threatening) angry mob. Is the ‘problem’ really the (clearly disempowering, in most contexts at least) combination ‘youth, illiteracy and ignorance’ here?

The understanding of equal access to justice within the larger attempts at making welfare rights justiciable allows one to point to the larger instrumentalities of access to justice itself, as a mechanism (among others) that should work for the entrenchment and

protection of fair patterns of distribution of wealth and other goods within a community. The invocation of the principles of the rule of law points to the instrumentalities of access to justice in giving practical value and purpose to formal laws, seen as grounds for the formation of convergent expectations and for expressing criticism among citizens. Both arguments refine and extend the first interpretation of equal access to justice: the ideal of equal legal protection. And yet each of them fails, because neither one of them can give adequate expression to the second interpretation (namely, the ideal of equal standing in open court), and to its relation with the ideal of equal social standing in general. Hierarchical and authoritarian societies can abide by the principles of the rule of law too, and grant fair distributions of the relevant divisible parts of the social product, and yet they typically fail to protect equal social standing to their citizens.

9. UNMET LEGAL NEEDS: IDENTIFICATION AND RICH DESCRIPTIONS

1. Introduction

This chapter begins to introduce the vocabulary of a Capabilities Approach (CA). The chapter discusses the first, most basic, contribution of a CA to the access to justice scholar. A CA is useful in the field of access to justice, the chapter argues, because it offers a pertinent and refined vocabulary, which can be used for rich descriptions of the relevant social phenomena.

We have good reasons to trust an evaluative approach on a relevant political or moral subject, this is the underlying assumption, if we can trust its vocabulary to provide rich and pertinent descriptions of the relevant social phenomena. This is a necessary requirement for trusting any evaluative approach. Any approach, which doesn't allow us to express our – pre-theoretical – evaluative concerns about the relevant social phenomena in a clear and explicit way, can only blindly (and, thus, unintelligently) guide us on concrete practical matters. It is not a sufficient condition for trusting the approach, however. Having a perfect picture of where we are going doesn't assure that we are going to like it when we arrive there.

The argument is framed by showing, first, the limitations of existing empirical approaches in providing one with the relevant pieces of information for evaluating a jurisdiction's successes, or failures, in protecting equality in access to justice. The chapter discusses, in particular, 'litigation-rates' studies, the gradual evolution of researches on

so-called ‘unmet legal needs’, and ‘transformation-studies’ in dispute-processing. Then, the chapter introduces a suitably general definition of CA, as a way of integrating the insights of previous approaches, and overcoming their limitations. This is not just a terminological quarrel: a CA’s vocabulary (and, in particular, its distinction between capabilities and functionings, and its distinction between basic, internal, and combined capabilities) helps the access to justice scholar, or so the chapter argues, to 1) identify the most relevant ‘informational-focus’ on access to justice; and 2) express the underlying evaluative choices called upon by such identification in a clear and explicit way.

2. Empirical studies of access to justice and their evaluative limitations

One of the fastest ways to get a first glance look at the map of disputes arising within a legal system is to collect data on so-called ‘litigation rates’ – that is, typically, the *ratio* between disputes formally initiated in a period of time and the size of the population under observation. ‘Litigation rates’ analysis is a classic topic within empirical analysis of law.

Today, ‘litigation rates’ studies offer a qualified view of the map of disputes arising within a legal system, and its possible relations with other interesting social phenomena within that country.¹ For example, Eisenberg et al.² have recently attempted to explain litigation patterns in India by accounting for measures of (nonexclusively economic) well-being (using the Human Development Index), and found that the latter explain litigation rates much better than traditional measures of GDP per capita.

However, when confronted with the problem that titles this section (How do we identify legal needs?), studies that make abundant (even if not exclusive) use of data on ‘litigation rates’ show a number of serious difficulties. First, note that the kind of data collected by observing ‘litigation rates’ can be, at best, interpreted as an approximate measure of the frequency of use, within a population, of legal services. Thus, it says relative little about the ability of individual users of legal services to make such use

¹ See, for example, Tom Ginsburg, Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation*, 35 J. LEGAL STUD., 2006, p. 31; Tom Ginsburg and Glenn Hoetker, *The Effects of Liberalization on Litigation: Notes toward a Theory in the Context of Japan*, in 8 WASH. U. GLOB. STUD. L. REV., 2009, p. 303; Erhard Blankenburg, *The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in the Netherlands and West Germany*, 28 LAW AND SOCIETY REV., 1994, p. 789 (all containing a nuanced discussion of the different institutional ‘infrastructures’, possibly affecting, either by encouraging or filtering, the emergence of legal disputes in different countries). See also Tonja Jacobi, *The Role of Politics and Economics in Explaining Variation in Litigation Rates*, 38 J. LEGAL STUD., 2009, p. 205.

² See Eisenberg, Kalantry and Robinson, *Litigation as a Measure of Well-Being*, 62 DEPAUL L. REV., 2013, pp. 247 – 292.

successful – that is, it says nothing about the effective protective *results* of lawsuits. Second, and consequently, such kind of data says nothing about to the actual ability of individual users of law to *mobilize* their formal legal rights (together with their resources, either economic, social or individual ones), in order to pursue or protect goals, goods, or personal and social relations, they have reasons to value. Put more succinctly, the kind of data collected in such studies points, at best, to the frequency of use of *one* tool for legal protection (namely, suing someone in a court of law), but it says relatively little (if anything at all), regarding the actual ability of individual users of legal services to *convert* such use (together with other tools, let us hope) in successful achievements, worthy of their human dignity.

3. Beyond litigation rates: unmet legal needs

A good way to capture some of what's left out by 'litigation rates' studies is to collect data at the micro-level, on the users' of legal services themselves. Traditionally, this kind of data is collected through surveys of the general population, asking each subject to report past legal problems, choose from a list of strategies the one she pursued, and finally either rate her own experience or report the final outcome she was able to obtain. Clearly, this is a very sensible improvement and, in many ways, I suspect it is by pursuing at least partially similar strategies that the next biggest results in the field of empirical studies on access to justice are expected to come.³

Not surprisingly, a number of pioneering studies on access to justice, carried out using precisely this methodology, turned out to be classics of the field. And yet, as

³ See, for example, BARBARA CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* (1977); *LEGAL NEEDS AND CIVIL JUSTICE, Major Findings of the Comprehensive Legal Needs Study* (1994).

Rebecca Sandefur helpfully summed it all up, these studies bear the serious risk of defining away much of what it is actually interesting in researches on *unmet* legal needs.⁴ Put perhaps a bit less dramatically, one big concern here is the risk of failing to realize that the term legal need is not one that can be defined away by the interpreter without any reference whatsoever to its antecedent use within the population under observation – or to an ‘internal’ point of view of the legal system and the larger society in question.⁵

Finally, another classic contribution to the field of access to justice came from so-called ‘transformation’ studies, many of which draw explicit inspiration from the pioneering work by Felstiner et al.⁶ Much of the success of this classic paper depends on its attempt at conceptualizing disputing behavior in terms of several distinct activities,

⁴ R. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, in 34 ANNUAL REVIEW OF SOCIOLOGY 342 (2008). The most striking aspect ‘defined away’ by such approaches (which directly asks respondents to relate their *legal* problems) is precisely an understanding of the different ways in which people actually *identify* their problems as ‘legal’ ones. Note that the whole question of a population’s ‘litigiousness’ (that is, its propensity to file suits or, in any case, pursue broadly legal remedies) may indeed change rather dramatically, if we limit the scope of our analysis to those problems that have been already identified as legal ones, or, instead, we include also those problems that, even though potentially justiciable, many would never even consider (for ignorance, poverty, hopelessness, social pressure, conventional morality and so on) to ‘get involved’ with the legal system and its professionals to ‘do something’ about. Rebecca Sandefur (see R. Sandefur, *Expanding the Empirical Study of Access to Justice*, in WISCONSIN LAW REVIEW 101 (2013), at 103) recognizes the pioneering *Civil Litigation Research Project* more than thirty-years ago as the crucial turning point in empirical studies of access to justice, in the direction of expanding the field’s initial scope and framework, and away from a ‘numerable’ understanding of disputes (that is, seeing legal disputes as identifiable and distinct ‘objects’ in the social world, which can be picked out and counted). See, for example, *Special Issue on Dispute Processing and Civil Litigation*, 15 LAW & SOCIETY REVIEW 525 (1980 – 81).

⁵ For some of the latest important developments (especially in the tradition of English socio-legal research), see H. GENN, *PATHS TO JUSTICE: WHAT DO PEOPLE DO AND THINK ABOUT GOING TO THE LAW* (1999); PLEASENCE, BUCK, BALMER (ED.), *TRANSFORMING LIVES: LAW AND SOCIAL PROBLEMS* (2007); PLEASENCE, BALMER, BUCK, *CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE* (2006); Pleasence, Balmer, *Changing Fortunes: results from a randomized trial of the offer of debt advice in England and Wales*, 4 J. EMPIR. LEGAL. STUD. 651 (2007); Pleasence, Balmer, Buck, O’Grady, Genn, *Multiple justiciable problems: common clusters and their social and demographic indicators*, in 1 J. EMPIR. LEGAL. STUD. 301 (2004). For important recent developments in the US (using randomized studies to evaluate the effects of different procedural arrangements, especially the provision of legal representation, in various forms), see D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make*, 121 YALE L.J. 2118 (2012); D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV 901 (2013).

⁶ Felstiner, Abel Smith, Sarat, *The Emergence and Transformation of Disputes*, in 15 LAW AND SOCIETY REVIEW 631 (1981).

and consequently, in visualizing access to justice as a path with obstacles, that one needs to surmount.

According to Felstiner, being able to access justice essentially means: 1) being able to *recognize* particular events as ‘injurious’ (*naming*); being able to *identify* the event as a grievance for which someone else is responsible (*blaming*); being able to *confront* the wrongdoer with the complaint (*claiming*); and, finally, the decision to *pursue* a remedy either through the courts, through self-help or other informal ways offered by the social institutions recognized by the aggrieved party. Also, Felstiner points to the various transformations that the original dispute undergoes to, while ‘travelling’ through such different activities and obstacles.

4. Why capabilities?

So, given this vast array of alternatives, why is it a good idea to identify unmet legal needs with the help, also, of a capabilities approach? Or, in other words, what are the advantages, when one is trying to identify unmet legal needs in a particular legal system, in relying, on one hand, on a background theory of social justice, and, on the other, on the *kind* of theory of social justice that a CA actually offers?

At base, on the reading proposed here, a CA offers a promising vocabulary and a number of foundational conceptual tools that allow people from very diverse backgrounds to identify, report and discuss the most troubling obstacles they find on their path to justice, and, then, *test* how different allocations of legal rights and forms of institutional design may help them overcome such obstacles. In particular, the language of a CA helps its users express perspicuously the possibly very wide gap between the

commitments which legal regulation seems to promise, and their actual realizations and achievements within the lives of its subjects, along three fundamental dimensions: which rights are *formally* recognized by law; the actual abilities of rights' holders to *mobilize* such formal opportunities for goals they value; and, finally, the combined capabilities that each individual enjoys as a result.

Define one's achievements (or functionings, in the CA's technical language) as the actual realizations of one's choices, like, say, 'attaining a certain level of education', 'being adequately nourished' or 'secure from domestic violence'. The CA describes individuals' or groups' advantages (or disadvantages) in terms of the latter's actual ability to *choose* among different combinations of achievements. That is, capabilities are defined *derivately* from realizations one has reason to value and *stand for* one's real opportunities to achieve *combinations* of such achievements. Notice that the focus on capabilities is wider and more capacious than a mere focus on what one actually ends up doing (one's combination of functionings), since it includes, crucially, what that person is actually able to do and be (technically, her 'capability set'), whether or not she chooses to do it.

The simple distinction between capabilities and functionings will prove quite useful even in the narrower field of access to justice. Public programs designed to promote access to justice should generally distinguish and clarify whether their purpose is to increase capabilities, or functionings, or a combination of both. Generally, it is *capabilities* that we should really be after (real opportunities for meaningful and effective participation in legal proceedings, whether one does end up so participating or not). Indeed, it would be hard to argue that access to justice has effectively improved in a given country by merely observing an increase in the number of trials (or that one

individual has better access to justice simply because she happens to appear more frequently in court). On the contrary, the expansion of one's legal capabilities (including, of course, the ability to use courts as an instrument for vindicating one's rights) could be sensibly seen as an improvement of one's access to justice both directly, since such capabilities would crucially include the ability of protecting one's rights in court (if one so chooses), as well as *indirectly*, since the expansion of one's real opportunities to use and mobilize her formal rights and entitlements may very well protect her, even *without* or *before* actually resorting to such use and mobilization. But, at times, actual functionings are the relevant informational space (an effective defense against ungrounded claims or allegations more generally, no matter one's actual choices).

Consider now the important distinction between *basic*, *internal* and *combined* capabilities, which is articulated especially by Nussbaum and left implicit, but still quite clear, in many of Sen's discussions and arguments.⁷ By *basic capabilities*, Nussbaum means "the innate equipment of individuals that is the necessary basis for developing the more advanced capabilities",⁸ by *internal capabilities*, instead, she means the "states of the person herself that are, so far as the person herself is concerned, sufficient conditions for the exercise of the requisite functions"⁹; and finally, by *combined capabilities*, she means "internal capabilities *combined with* suitable external conditions for the exercise of the function".¹⁰

I mentioned already how one of the key insights in so-called 'transformation studies' of disputes is the attempt at identifying a list of different abilities, which people

⁷ See, for example, A. Sen, *Human Rights and Capabilities*, in 6 JOURNAL OF HUMAN DEVELOPMENT 154, (2005).

⁸ See M. Nussbaum, *Capabilities and Human Rights*, in 66 FORDHAM LAW REVIEW 289 (1997).

⁹ *Ibid.* at 289.

¹⁰ *Ibid.* at 290.

typically display when pressing their claims to the law. Felstiner's fixed list of activities and, correspondingly, of possible transformations, within disputing processes, can be criticized in various ways, since, quite obviously (and this is a point that the authors readily admit), not all disputes will display an identical sequence of such transformations. At times, we may pursue a remedy without blaming¹¹, or claim without having identified any specific wrong (in the rather narrow sense attributed by the authors themselves, as an 'injurious' act by others on our integrity) and so on.

But the fundamental insight here (and one which any approach in access to justice can most fruitfully build on) is in defining one's ability to successfully litigate her claims and pursue a remedy (either through the courts or by some other social mechanism of dispute resolution) as a *combined* capability – that is, as a number of integrated abilities in carrying out different activities (whether or not, these, in turn, will actually correspond at all times to the ones mentioned above), and possibly requiring the development of a number of *internal capabilities* (ranging, for example, from simple ones like the ability to read and speak or understand the language in which one's legal rights are written, to more complex and fragile ones, like the ability to *aspire* to the legal protection of the law, or to

¹¹ There is a further problem in identifying *blame*, without further qualifications, as *the* standard response to (or, more generally, attitude toward) one's grievances – a problem, that is, that goes far beyond the mere empirical observation that indeed *not* all parties to legal proceedings necessarily display such emotional response, and that invites one to look at 'blaming' directly from a normative point of view, assessing its actual point and use in people's practices of criticism and contestation (within or outside the legal system, concerning one's own or others' rights or interests). Indeed, it has been observed that 'blaming' (especially when considered together with the related, but different, emotion of 'anger') seems a rather suspicious attitude, moving (or, in any case, risking to move) one's away from a reasonable concern over injustice (both for self-interested, as well as altruistic reasons and motivations), toward an egotistic, and highly problematic, desire of 'revenge' and 'pay back'. Relatedly, one may very well conclude that in expanding people's access to justice we should, *at the same time*, be attentive *not* to encourage 'blaming someone' as the standard response to any wrong or injustice that one may perceives. Correspondingly, the expansion of access to justice, on the basis of equal respect and concern for everyone, could be seen as both requiring as well as encouraging, also, a *transformation* of people's attitudes toward the specific wrongs and injustices that they perceive. Consequently, the degree in which a particular legal system actually encourages or protects such 'transformations' could be seen as a further *test* in assessing the quality of the different mechanisms through which it actually delivers justice to its citizens.

anticipate one's legal position depending on one's own actions or the actions of others) as well as a complex combination of clearly external conditions (the actual importance and impact of which may significantly vary depending on the development of one's *internal* capabilities), that could include *both* the presence of material resources (like, for example, the existence of physically accessible courts, or other forums, not too far from where one lives) as well as the availability of effective collaborations and coordination with the activities of others (like lawyers, clerks, judges and so on).

Interpreting access to justice as a *combined* capability (rather than a single homogeneous entitlement that should be somehow equally allocated to each party of any legal proceeding) has far-reaching consequences in many exercises of practical evaluation in the field of access to justice. For one thing, careful analysis of the different components of one's general ability to mobilize formal entitlements for valued purposes, might identify the parametric variations between different parties in converting procedural entitlements in effective and real opportunities for meaningful action and mobilization. Also, a comprehensive understanding of the general capability of access to justice helps the identification of the distinct effects of attributing a specific entitlement (like the right to counsel) within the larger context of one's capabilities and functionings.

PART II

NORMATIVE FOUNDATIONS

OVERVIEW

The aim of this section is to elaborate a positive theoretical proposal for understanding the point of equal access to justice for all.

This section argues that Governments have weighty commitments in protecting equal access to justice for all, because people themselves have a duty to, at times and provisionally, pause, cool down and listen, and thus ought to demand for Governments' intervention in the administration of justice. Also, the section proposes a specification of the political content of such duty, formulating three principles of equal access to justice.

The section is divided in two chapters. Chapter 10 introduces the argument by observing that Nussbaum's proposal to introduce practical reason, together with sociability and bodily need, at the earliest stages of her reconstruction of the political conception of the person (as well as, crucially, her proposal to view practical reason, sociability and bodily need as intertwined, rather than severed, aspects of our shared human animality) has far reaching implications for the access to justice scholar.

Nussbaum's version of the Capabilities Approach (CA), this chapter argues, allows one to identify the specific human function which makes equal access to justice valuable for us, and thus it helps one to ground the demand for equal access to justice as an essential component of a life worthy of human dignity. In particular, the specific human function, which makes equal access to justice valuable, this chapter argues, is the

ability to disagree with others, without disrupting social ties, but reaffirming the bonds that justify social cooperation.

Finally, this chapter argues that the identification of such human function grounds the recognition of a duty, to all members of a cooperating community, which this paper calls the duty to, at times and provisionally, pause, cool down, and listen. Recognition of the latter as a pre-political obligation owed to everyone in virtue of being alive, triggers the specific political obligations which motivate the demand for equal access to justice for all.

In order to tease these commitments out of Nussbaum's CA, and anticipate and meet the most important objections that one could raise against them, the chapter begins with an account of Amartya Sen's famous distinction between so called process aspects of freedom and opportunity aspects of freedom. The aim of this discussion will be to show, first, why uncritical acceptance of Sen's distinction would be especially harmful for a reasonable theory on equal access to justice; second, this subsection tries and reconstruct the (reasonable) motivating concerns that explain Sen's insistence on the distinction and, finally, it shows how Nussbaum's version of the CA offers one all the conceptual resources that one needs to give adequate expression to Sen's motivating concerns, without the damaging practical consequences that could follow from Sen's theoretical distinction itself.

The chapter concludes by commenting on the comparative advantages of grounding Governments' commitments in access to justice on a pre-political social duty, instead of a pre-political entitlement, like a human right.

Chapter 11 connects the different threads of the argument, and elaborates on the value of protecting and nurturing access to justice as a feature of claim making in a democratic community of equals.

The point of the chapter is to carve out political principles that could both provide a general justification of the public commitments to protect and develop the specific human function which makes equal access to justice valuable, thus grounding the duty to, at times and provisionally, pause, cool down and listen, as a specific political obligation; as well as help one to interpret and then apply, the specific content of the public commitments and duties thus justified and grounded.

Taking its lead from Elizabeth Anderson's, pragmatist, conception of democracy as a particular kind of social cooperation among equals, the analysis argues that: first, expanding people's real opportunities of accessing justice has a value that is dependent on, but not only instrumental to, the value of protecting institutional and social arrangements that allow the effective cooperation between all persons on the basis of their equality; second, social interest and political focus on access to justice has an epistemic value, since it points to perspicuous evidence on the actual functioning of legal and political institutions and on the possible effects of legal reforms; relatedly, effective access to justice for all empowers citizens to devise coordinated strategies of contestation, both within as well as beyond the narrow domains of legal activism; and, finally, consistent efforts to realize effective access to justice for all in the space of capabilities have an expressive value, since they embody the ideals of a democratic culture.

These three political principles thus specify the political content of the duty to pause, cool down and listen: We should model public institutions in access to justice, the chapter argues, as a means to protect people from hierarchical social relations, as a means to protect the epistemic capacities of public institutions, and as a means to express a democratic culture in dispute resolution.

10. WHY CAPABILITIES?

ON THE DUTY TO, AT TIMES AND PROVISIONALLY PAUSE, COOL DOWN, AND

LISTEN

1. Process based or outcome based aspects of freedom: on some practical damages of a classic theoretical distinction.

Strictly speaking, Amartya Sen himself could very well disagree with one of the most basic ideas of this paper – namely, the use of a CA in interpreting the demands of equal access to justice. Increasingly over the years, Sen has emphasized a distinction between, what he calls, respectively, process and opportunities aspects of freedom.¹ Most frequently, the distinction appears in his treatment of the relation between human rights and capabilities, with the latter covering opportunity aspects of freedom, and those only, and the former covering both process as well as opportunity aspects of freedom.

Consider this example, which displays recurrent features of Sen's own presentation of the distinction. Tirla has just come home after a long day at work. He is exhausted and bored by almost everything that he can think of doing. He only wishes a good and easy book to lose himself in a distant world, a glass of whisky to slow his thoughts down, and a comfortable bed. A group of friends unexpectedly gathers at his

¹ See, for example, AMARTYA SEN, *THE IDEA OF JUSTICE* (2009), and, A. Sen, *Human Rights and Capabilities*, in 6 *JOURNAL OF HUMAN DEVELOPMENT* 150 (2005), at 155, 156, arguing that “While the idea of capability has considerable merit in the assessment of the opportunity aspect of freedom, it cannot possibly deal adequately with the process aspect of freedom, since capabilities are characteristics of individual advantages, and they fall short of telling us enough about the fairness or equity of the processes involved, or about the freedom of citizens to invoke and utilise procedures that are equitable”.

house, and forces him to join a never-ending discussion on the latest developments in national politics. So, Tirla not only doesn't get to do what would have been most conducive to his own well-being (losing himself in a distant world, slow his thoughts down, and then fall asleep in his bed) – that is, the opportunity aspects of his freedom – but isn't even in control of what actually happens to him, the process aspects of his freedom.

But suppose now that Tirla's friends are not quite as insensitive as they appear to be and, noticing that their friend needs a good night sleep, they slip a pill in his drink and then go on discussing urgent matters of national politics at his house. Assuming that the pill that Tirla's friends used is not more harmful than a glass of whisky (just more effective and faster in causing sleep), Tirla could be said to have realized what he wanted to do (the opportunity aspects of his freedom). And yet the process aspects of his freedom have been clearly violated. There would clearly be little sense in saying that Tirla chose and actively pursued what he wanted to do (as opposed to what his friends thought that he should do). So, one's capabilities can tell us a great deal about how well things are going for one (did Tirla get some rest?). But they cannot tell us whether whatever one ends up doing or having, actually tracks one's active and autonomous choosing and acting (was Tirla the one who was actually deciding what to do of his night?).

I have implicitly emphasized throughout this essay that access to justice clearly relates to both process aspects as well as opportunity aspects of freedom. On one hand, we have the classic 18th and 19th century rights of the *accused* to, for example, be advised of the charges against him, to not be punished or treated as guilty while he awaits trial, to

retain a counsel of one's choice and so on; on the other, we have the more modern, 20th century expansions of such rights, such as the right to the appointment of counsel if one cannot pay for it, the right to a hearing before termination of one's welfare rights, the introduction of group or collective procedures, and so on.

Endorsing the distinction would then disarm any attempt to use a CA to interpret significant, and important, aspects of access to justice, by impeding unitary treatment of otherwise *different* aspects of legal proceedings.

I said strictly speaking and then immediately added the qualifier 'could', however, to signal that this might not be Sen's definitive stance, all things considered. In many of his recent writings, he clearly takes a practical stance on the relation between the development of the rule of law and social and economic development in general which is congenial to the approach presented here.²

And yet, the theoretical challenge (how we are to use a CA in interpreting the process aspects of freedom) is there nonetheless, but since it doesn't seem to track disagreements over concrete practical evaluations, instead of going head on to argue against the distinction itself, let us begin by inspecting the motivating factors that might explain Sen's insistence on it, and then elaborate on what can be learnt from them in the field of access to justice. Finally, let us see whether one can find a way to give them appropriate theoretical reconstruction without such damaging consequences. As we shall see, the basic conceptual tools that one needs to do this are already all in place within Nussbaum's own version of the CA. Inspecting these, will take us a long way toward identifying the relevant social function which equal access to justice should protect, the

² See, for example, A. Sen, *What is the Role of Legal and Judicial Reform in the Development Process?*, speech gave on the 5th of June, 2000 at the World Bank Legal Conference in Washington.

moralized interest we all have in its protection, and the basic duties that we should impose on one another to realize it.

2. Sen's motivating concerns with distinguishing between process and opportunity aspects of freedom

The practical relevance of Sen's distinction between process and opportunities aspects of freedom relates with three things, essentially. First, Sen stresses the importance of recognizing plural (as opposed to singular and reductive) accounts of the good. There are many different things that different people might legitimately want (or not want) to do or pursue, or be; process aspects of freedom typically have to do with the acknowledgement that there are aspects of people's lives over which public policy should refrain from imposing any substantive account of the good. Going back to the example above, Tirla could legitimately be happy, both relaxing and chilling with a good book and some alcohol, as well as talking politics all night long. *He* needs to decide. Moreover, if *he* cannot find the right kind of book that he wishes to read, or a decent whisky to sip, then that is just tough luck for him.

Second, and relatedly, protecting process aspects of freedom means, essentially, to protect people's choices against third-party interferences. Tirla chose to relax and drink alcohol tonight, and there should be little that his friends should be authorized to do (without Tirla's consent) to refrain him from doing it.

Third, process aspects of freedom impose limits to the pursuance of complete equality in the space of capabilities. Perhaps his friends are right, and Tirla would indeed be better off talking politics ('we are on the eve of a revolution', they might argue, 'and

you prefer instead to drink yourself unconscious and numb yourself with a lousy novel?’), or with a sleeping pill (‘you know, alcohol doesn’t really help you to fall asleep’), rather than with a book and some whisky, so that their intervention could be said to increase his well-being. But the truth of these beliefs doesn’t give Tirla’s friends any privilege to impose on him *their* understanding (deep and justified as it might be) of what is best for *him*.

These three points represent some of Sen’s practical concerns, which seem to motivate the theoretical distinctions between aspects of freedom. But there is more to ponder about. Whereas process aspects of freedom have to do with cases in which no single account of the good seem univocally legitimate, opportunity aspects of freedom clearly call for an account of the good, even if only a partial one like Nussbaum’s. But this prompts the question for the access to justice scholar: how can we derive what requires public support and protection in access to justice from a theory of the good? After all, effectively claiming something in a public trial can hardly be seen as a component of the good life. All things considered, most people would presumably prefer getting on with their lives without *having to* claim anything to anyone, and thus exposing themselves (as well as submitting themselves) to the criticism and judgment of others. Also, does the affirmation of the value of access to justice as a fundamental component of a life worthy of human dignity commit one to say that people should (both prudentially, as well as, most importantly, morally) initiate, or actively participate in, formal claims against whoever violates their rights and privileges, and for whichever violation of the latter?

This is certainly an unattractive conclusion, even assuming that the legal system in question did a fairly good job in matching the recognition of valid legal claims to one's moral rights. In fact, at the very least, this would commit one to support a highly litigious society, in which *any* violation of formal laws, even the most trivial, could consume public resources, and impose costs on social cooperation. The political motto 'if *a* law has been broken, then *the* law must be publicly repaired' seems obtuse and formalistic, and has troubling authoritarian connotations.

So, Sen's distinction might appear to be very useful to the access to justice scholar. It allows one to stress the importance of protecting pluralism, individual choice and autonomy. It advises to limit the expensive demands of full equalization of people's real opportunities, while it warns of the dangers of an excessively litigious society.

Finally, it does not commit the interpreter to the implausible reading of *actual* participation in legal proceedings as an essential component of the good life.

Its helpfulness comes at significant costs, however. First, as we have seen already, a merely formal understanding of access to justice (that is, access to justice as a set of rights against state interference) would not give one adequate grounds for limiting *abuse* of procedural opportunities by relatively wealthier parties, thus hiding the harms that formally equal protections in procedural law might cause to *equal* access to justice. Second, as we also have already seen, participation in legal proceedings exposes one to significant costs, of various kinds. This means that any reasonable theory on access to justice has to be able to 1) identify the specific human function that makes access to justice valuable to us; 2) identify the costs that the actual exercise of such function imposes; 3) evaluate when the value of the former could justify the imposition of the

latter, and to whom. But this means, also, that a reasonable theory on access to justice needs to rely on a background theory of the good, in order to get off the ground.

3. Nussbaum to the rescue: on the human animal condition, lists and the duty to pause, cool down and listen

Let us assess now whether Nussbaum's different version of the CA helps one to think well (or better) about these difficult problems. Nussbaum's key move, which is specifically relevant in the field of access to justice, leads one, more generally, to one of the most distinctive features of her own version of the CA – namely, the political conception of the person out of which, as she says, political principles grow.³

We should begin by noticing the Aristotelian origins of Nussbaum's views of the person. The person, according to Nussbaum and Aristotle, is a “social and political animal [...] who seeks a good that is social through and through, and who shares complex ends with others at many levels. The good of others is not just a constraint on this person's pursuit of her own good; it is a part of her good” (*FJ*, 158).

So, for Nussbaum, “a strong commitment to the good of others is a part of the shared public conception of the person from the start. The person leaves the state of nature [...] not because it is more mutually advantageous to make a deal with others, but because she cannot imagine living well without shared ends and a shared life” (*FJ*, 158).

Nussbaum's CA, thus, uses an account of social cooperation “that treats justice and inclusiveness as ends of intrinsic value from the beginning, and that views human

³ See MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE, DISABILITIES, NATIONALITIES AND SPECIES MEMBERSHIP* 2006, chapters 3 and 5 especially (*FJ* from hereinafter).

beings as held together by many altruistic ties as well as by ties of mutual advantage” (*FJ*, 158).

But what’s then the ultimate (or most important, or essential) criterion, which should determine to *which* beings exactly we owe just and equal treatment? Can rationality perform this function?

Nussbaum characteristically downplays traditional idealizations of rationality, which view the latter in opposition to animality. But she also identifies the resulting non-idealized rationality as a peculiar function in human animal conduct: “The specifically human kind is indeed characterized by a kind of rationality[...] but [...] it is just garden-variety practical reasoning, which is one way animals have of functioning.” (*FJ*, 159).

Rationality (especially the non idealized, garden-variety practical reason she refers to) however, is hardly the only thing, which is peculiar about the human animal condition. Sociability, Nussbaum adds, “is equally fundamental and equally pervasive” (*FJ*, 160). Humans do not typically strive for valuable goods *only*. Rather, they strive for enjoyment of valuable goods *in company* of others. We have no way of conceiving the genesis, enjoyment and transformation of valuable objects and human functions but for placing the latter in the context of social processes and interactions that put one individual (its body, as well as its garden variety rationality, or its ‘conscience’) together with others. Intelligence and competence in practical matters is just one form that such social processes and interactions might take.

Neither rationality nor sociability creates values out of thin air, however. Both are grounded in the objective conditions of the *bodies* that we inhabit: “bodily need,

including the need for care, is a feature of our rationality and our sociability; it is one aspect of our dignity, then, rather than something to be contrasted with it” (*FJ*, 161).

So, to sum up: Nussbaum’s version of the CA acknowledges that “we are needy temporal animal beings who begin as babies and end, often, in other forms of dependency. [It] draw[s] attention to these areas of vulnerability, insisting that rationality and sociability are themselves temporal, having growth, maturity, and (if time permits) decline.” (*FJ*, 160) Furthermore, Nussbaum’s CA acknowledges, “that the kind of sociability that is fully human includes symmetrical relations [...] but also relations of more or less extreme asymmetry; [it] insist[s] that the nonsymmetrical relations can still contain reciprocity and truly human functioning” (*FJ*, 160).

Given this background, Nussbaum then lists ten central capabilities that, she argues, should be thought of “as embodied in a list of constitutional guarantees, in something analogous to the Fundamental Rights section of the Indian Constitution or the (shorter) Bill of Rights of the US Constitution” (*FJ*, 155). These are: 1) life, 2) health, 3) bodily integrity, 4) sense/imagination/thought, 5) emotion, 6) practical reason, 7) affiliation, 8) living with concern for other species, 9) play and 10) control (political and material) over one’s environment (see *FJ*, 76). These ten capabilities are intended as general goals, which provide a minimum account of social justice – that is, their identification and justification as political principles give shape and content to the intuitive, but abstract, idea of human dignity.

The argument for the inclusion of each one of them within the list (and, thus, as a specification of a fundamental entitlement, owed to everyone), heavily relies on imagination and discursive, qualitative argumentation – can you think of a life without

each and everyone of such capabilities protected at a minimum threshold level as a life worthy of human dignity?

Crucially, and going back to Sen's distinction, Nussbaum's list is explicitly intended to cover *both* process as well as opportunity aspects of freedom, as it explicitly includes the major liberties which Sen locates within the process aspects of freedom – namely, the freedom of speech, association, and conscience. Moreover, the point of providing a list is precisely to give concrete content to a *plural* account of what makes a life worthy of human dignity, to which all aspects identified by the ten central capabilities independently, but jointly, contribute. So, *no* violation of either one of such capabilities could be justified in order to protect or expand another.

Going back to our example then, Tirla can rest assured that a society which protects all ten of Nussbaum's capabilities (and guarantees their protection to everyone) would clearly protect his plan for his depressed night, home alone.⁴

But how can we transfer these thoughts to the field of access to justice? It might be tempting now to simply choose one of such capabilities (say, control of one's environment), and then derive the principles that should govern equal access to justice as

⁴ See, for example, M. Nussbaum, *Constitutions and capabilities: "Perception" against Lofty Formalism*, 121 HARVARD LAW REVIEW 1 (2007), at 12: "Notice that the political goal is capability, not actual functioning. Government ought to give people a full and meaningful choice; at that point, the decision whether to take up a given opportunity must be their own. Respect for a person requires not dragooning that person into a particular mode of activity, however desirable it might seem", (adding that "Compulsory education of children is an exception to this rule, because children are not yet fully capable of meaningful choice". For a more qualified view on children's rights under a CA, see however, R. Dixon and M. Nussbaum, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, in 97 CORNELL LAW REVIEW 549 (2012)). Thus, Nussbaum concludes: "having meaningful political rights (and really having them, not just as words on paper) does not require one to participate in politics. Members of the Old Order Amish have the right to vote, and they choose not to use it. That is just fine. To compel them to vote would be insufficiently respectful of their freedom. Similarly, people who have adequate nutrition available may always choose to fast — for example, for religious reasons. There is, however, a large difference between fasting and starving, and it is that difference that the CA wishes to capture". For a similar argument by Sen, see AMARTYA SEN, *THE IDEA OF JUSTICE* (2009), at 235 – 238.

second order, instrumentally valuable, specifications of the chosen capability.⁵ This is not a bad strategy altogether, since on one hand it calls for legal and political philosophers to concretely think through the principles of access to justice as specific observables (i.e.: tell us, concretely, what it is that we should look for out there in the world, when we evaluate equality in access to justice). On the other, the very method of justification, which the approach uses, can be further extended (and, indeed, it is explicitly intended to be extended, given the open-ended nature of the foundational list itself), even when we move on the problem of further refinement and specification of each of the capabilities on the list. That is, we should begin the justification (and the implementation) of the relevant institutional protections of equality in access to justice by imaginatively thinking about a life *without* real opportunities of making one's claims (over specific substantive rights and interests) count (and count in the right way) and ask – is this a life worthy of human dignity? Or, even more concretely, we begin by observing what is it that people do (or don't do), in any given jurisdiction, whenever they set themselves to the task of making claims about the protection, or expansion, of one relevant capability or another, and ask: is this worthy of their human dignity?

As we think of these questions, we can see why the proposal to interpret access to justice, as a second-level specification of one of the ten capabilities in Nussbaum's list, would still sell the insights of Nussbaum's version of the CA far too short. For one thing, the introduction of sociability and bodily need at such early stages in the reconstruction

⁵ This is, in fact, the gist of both of Jay Drydyk's proposals for an interpretation of, what he calls, the 'capability to having a fair trial': we either take fairness as something that we *all* have reason to value as part of a good life (and thus, in my terminology, include access to justice within the ten first-level capabilities), *or* we specify the relevant capability as a second-level capability, anchored to the first-level capability of control over one's social environment, see Drydyk, J., *Responsible Pluralism, Capabilities and Human Rights*, 12 JOURNAL OF HUMAN DEVELOPMENT AND CAPABILITIES 39 (2011), at 45.

of the political conception of the person already gives one plenty of reasons to demand the creation of public forums, where people could effectively claim peaceful resolutions to social disagreements, in a way which doesn't disrupt social affiliations but rather invites, or even lends itself to, re-affirmation of the bonds that justify social cooperation itself.

All we need to add to sociability and bodily need is the empirical prediction, that any credible political psychology would tend to generate, that disagreements will indeed emerge, contradistinguishing ordinary experiences of law and legal institutions, so that it is both prudent and reasonable to publicly monitor and manage their impact on social cooperation itself. In sum, the relevant function that makes access to justice valuable to *us*, is nothing less than the ability to disagree, while preserving (or even extending) social affiliations.

This is a valued human interest, moralized, through and through. So it should not be seen as imposing duties on public institutions *only*. Surely, the human moralized interest in protecting the possibility of peaceful disagreement provides reasons for creating and then supporting public institutions for conflict resolution. But when we demand access to justice, we are not *just* asking for appropriate levels of taxation, which could finance accessibility to public forums for conflict resolution (although, of course, we are asking that to). On the contrary, if the former is the relevant function that makes access to justice valuable to us, then we should also recognize duties to individuals directly – including, crucially, the duty to be willing to expose oneself to the criticism of others, and be disturbed, in the enjoyment of one's own capabilities, by the claims of others.

Call this the ‘duty to, at times and provisionally, *pause, cool down and listen*’ to whatever others claim that one is doing wrong. If people can be thought of as *not* merely wanting to hold on to, or increase, or add whatever it is that they wish to hold on to, but, rather, as wishing to pursue what is good for them in a way which could meet the agreement of relevant others, then they should *also* be ready to listen to what others say that they are doing wrong.

Now, Sen’s distinction between process and opportunity aspects of freedom apparently gives one a cogent way to interpret the content of such duty. Assuming that it is typically not pleasant, for anyone, to listen to someone explaining to one what one has done wrong, then *this* is a case in which the good of others is *just* a constraint to the pursuance of one’s own good. To see why this is only apparently so, and why the distinction might confuse one about otherwise important aspects of the duty, compare the latter with the duty which is correlative to the right of free speech, which is typically interpreted as a right against third party interferences – a process-based aspect of one’s freedom, in Sen’s vocabulary. Now, the duties that the right to free speech imposes to private citizens do not include, directly, duties to pause, cool down, and listen. In fact, at times at least, recognition of a right to free speech advises *against* listening, and just turning one’s head, and keeping on with business as usual. In order to include duties to pause, cool down, and listen, and then assure that these duties are actually complied with, we need an account of *why* pausing, cooling down, and listening to unpleasant arguments, might be valuable to the person on which such duties are imposed. We need an account, that is, of what’s valuable, for one, in *being told* that what one is doing is wrong. And notice: what’s valuable here is not just that the relevant other has been offered a chance to

speak up his mind. Rather, it includes the consideration that one is afforded real opportunities to effectively *persuade* others – that is what *listening* to someone who is making a claim is supposed to achieve. But this implies, in turns, that the duties that we should impose on private individuals, and that stem from the recognition of access to justice as a valuable human function, cannot be thought of, and thus designed, as merely protecting others' *process* aspects of their freedom (and those *only*). Rather, they shall include (in a way that still needs to be specified) protection of others' opportunity-aspects of freedom as well.

4. Equality in the space of capabilities

But, even when it is granted that access to justice is a valuable good, which reasons do we have to value *equal* access to justice? Or, to put it in the perspective of private individuals, why should the duty to, at times and provisionally, pause, cool down, and listen, should be stretched as far as to include reasons for the creation of public institutions, which protect meaningful and *equal* participation in legal proceedings?

One way to justify *equal* access to justice could be to think about the latter's requirements in roughly contractarian terms. Thus, we could say that *equality* in access to justice stems from considerations of mutual advantage for cooperating members of society. We should think of the duty to, at times and provisionally, pause, cool down, and listen, and correlatively, the general right of access to justice, then, as the bargaining chips, which cooperating members of society negotiate with, in order to receive institutional protections, in exchange of renouncing to private violence as a means to adjudicate social disagreements. So, we first grounded access to justice as a valuable

human function by introducing sociability and bodily need, along with practical reason, in the political conception of the person, from which we are trying to derive political principles for a just social order. But now, it appears, in order to ground *equality* in access to justice we can throw them out again and appeal, merely, to mutual advantage. We have already seen how a contractarian strategy of justification could hardly justify the most expensive programs in access to justice, however. Impartial adjudication plays a role, we have argued, in letting us see the deep links between equal access to justice and legitimacy in authoritative orders, but impartial adjudication alone would then limit our commitment to watered down public duties, in the civil domain especially. But perhaps it is time to just bite the bullet, and simply conclude that such expensive programs *cannot* be justified. We can add now a further problem, however, that one can see only when sociability and bodily need are introduced in the relevant political conception of the person. We have very few reasons to believe, and a lot more to doubt, that a legal system in which people understood their duty to pause, cool down, and listen, as merely something that they need to give, in exchange of not being threaten with private violence, could really be stable in time. Which reasons one might have for *listening* to the claims of others against one, if all that one is interested in is the power of the *threats* that others can make. Furthermore, and, again, going back to an argument that goes to the foundational core of both Sen and Nussbaum's versions of the CA, in order to model the relevant exchange in a way that could justify equality in access to justice (renunciation of violence in exchange of access rights) one needs to assume roughly equal powers among the contracting parties. Equality is a reasonable demand, in this model, as long as we could suppose that the contracting parties could credibly threat others, even *before* having been

granted access rights. But this blinds one about situations in which the law does indeed offer legal protection to a being, but either doesn't grant standing, or doesn't recognize full human agency, or either. The thought here is that the law should design and plan things in such a way that it could afford legal protection even in cases in which because of temporary or permanent disabilities, the relevant party cannot, by herself, mobilize legal resources in an adequate way. Equal and meaningful participation in these cases is participation by beings who could not, by themselves, credibly threat others with violence, *without* access rights. So, either we understand equality by thinking in a contractarian fashion, but then lose normative grip on such cases; or, we shall lose equality altogether.

Nussbaum's version of the CA offers a more reasonable strategy. Most directly, her insistence in demanding the search for reciprocity even in asymmetrical relations, assures that her version of the CA is able to give one standards to evaluate meaningful and equal participation in legal proceedings even when the being in question cannot be considered to be fully competent to act on her own. To be sure, Nussbaum's insistence is motivated by her plan to include treatment of persons with disabilities and non-human animals within the core structure of her theory of basic justice (without deferring the problem, that is, to only *after* that the basic duties and rights based on justice have been allocated among fully cooperating members of society).

This is already extremely valuable for the access to justice scholar, since, as I have mentioned, it allows one to comment on cases in which, as we have seen, legal systems attempt at providing legal protection to a being (say a nonhuman animal), without granting standing to it; and cases in which the legal system grants legal

protection and standing to someone (say, a person with a severe cognitive disability), without recognizing her capacity for full and competent human agency.

But the point has a more general (and direct) application in the field of access to justice. Recall Justice Sutherland's famous line: Even the intelligent and educated man has most times no knowledge of the science of law. Left to his own devices, Sutherland observed, he would be left without a defense. Put more generally, participation in legal proceedings (and interactions with the legal system more generally) exposes one (no matter his physical strength and mental powers) to extreme forms of dependency and vulnerability. No human (abled-bodied or less so), when taken in isolation, can be plausibly seen as possessing roughly equal powers to *the law* itself. Or, to be even more dramatic, the force that the law can exert on one, can clearly crush any human, when taken in isolation, that it finds on its way.

Notice what this (rather trivial) observation does to our reasons for demanding equal accessibility (extending it beyond rational agency, or physical proneness, or even humanity). We began with singling out garden-variety practical reason, sociability and bodily need and noticed that these features, pervasive and central in human animality (and, albeit to a lesser degree, even in non human animals) call for public support to a specific function, which we argued, makes access to justice valuable. Now we can add that, with respect to one being's relation with the law, differences in such very features are trivial, in fact – when confronted with law's power, everyone, when taken in isolation, is a vulnerable and fragile being. It is one special (and rather obtuse) kind of *social* arrogance (perhaps contingently justified by *arbitrary* contextual features) to think

of oneself as being above the law.⁶ But this means that instead of having to justify equal treatment, despite the obvious *differences* between the various beings to which we accord legal protection, we have to justify *differential* treatment, despite the obvious *similarities* in basic conditions! And that is all we really need for the requirements of equality to kick in – that is, that is all we need to pose the question which motivates this essay, namely: which specific conception of equality we should use to critically discuss access to justice.

Now, this should *not* be taken to imply that, according to a CA, symmetrical relations should not play any role in the formulation of reasonable political principles in access to justice. Consider, again, what we called the duty to, at times and provisionally, *pause, cool down and listen*. Clearly, there is much value in interpreting the requirements of this duty in, roughly, symmetrical and reciprocal terms. One's motivation to comply with the duty (crucially, however, *not* the latter's content) might be related to her expectations that others will generally comply as well and, thus, *pause, cool down, and listen* to, whatever *she* claims that *they* are doing wrong. What's important not to lose sight of, however, is the understanding that we should model symmetrical relations in a way that is congenial to the protection of reciprocity in the context of one clearly *asymmetrical* relation – namely, one's relation with the law itself.

⁶ I should note that there is no need for any grand metaphysical view of the law, as the will of an incarnated divinity, or something of the kind, to believe this. On the contrary, it is precisely a moralized understanding of the nature of law (whether delivered by metaphysical inspirations, or else) that typically blinds one about the extreme vulnerability of all men with respect to the law itself. All one needs in order to see this is the hartian union of primary and secondary rules, together with a master rule of recognition, which is accepted and complied with by the vast majority of public officials from an internal point of view. Beginning with this, one can then see that the power of law is the power of concerted action by public officials, who act in the belief that they are *normatively* authorized to do what they are doing. It is only someone who believes that there are real, concrete and pervasive limits (coming from high above, or from our ethical lives within, and existing, crucially, independently of any concrete action, explicitly directed to make them *count* in the production of law) to what *actual* laws *can* command (and thus, to what the concerted efforts of the vast majority of public officials could amount to), who can *also* believe to be in a roughly symmetrical relation with the law itself.

When we consider these points together, we can see why a CA can give one a much firmer, and sharper, grasp of the reasonable limits that law should impose on access to justice, in order to protect *equal* access to justice. Since the valuable function that equal access to justice should protect relates to one's opportunities to make claims on others, while re-affirming the reasons that justify peaceful social cooperation among equals, abuse of procedural resources is then excluded in the definition itself of the relevant capability. As we have seen, the function that makes equal access to justice valuable to us, imposes duties not only to public institutions, but to private individuals as well, so that the very capability of access to justice calls for and justifies limits to its exercise in virtue of the consideration that is owed to the capabilities of others. Moreover, the economic inefficiencies of a litigious society are monitored against the whole background of the specific human functions that make economic goods and productivity valuable, and then taken to be relevant to the extent that they have an impact on people's capabilities.

5. The good that we seek: capabilities or functionings?

So, does the interpretation of access to justice as a valuable human function commit one to arguing that formal laws should be seen as the best, and only, forum for the resolution of any social conflict? Does the interpretation so far proposed of access to justice commit us to imposing duties on private individuals, entirely excluding their choices about when and why they can, or must, exercise the opportunities that equal access to justice would grant them?

An affirmative and uncompromising answer to both these questions would clearly be unrealistic, and it would most probably authorize, if not encourage, the over judicialization, or over bureaucratization of social life, which common sense in contemporary market democracies so frequently despises and blames on the legal system generally, or on lawyers specifically. Thus, bracketing the issue about whether common sense is right here, it should be of interest to explain why the approach presented does not commit one to affirmative answers in either case.

The identification of the human function that makes access to justice valuable to us, as the ability to address social conflicts while re-asserting the values that inspire peaceful social cooperation, does not exclude, but rather invites, the understanding of recourse to law as a last, and perhaps residual, resort to addressing social conflicts. People might very well be generally invited to finding creative and context specific solutions to whatever disagreements they might have, provided that recourse to law is a real, and viable option, which offers reasonable solutions to their problems; and provided that such creative and context-specific solutions are not damaging for the capabilities of others.

Indeed, a CA already offers one a rich vocabulary for expressing this thought. What we should say, that is, is that reasonable policies in access to justice should typically aim for the protection of people's capabilities, and, thus, only indirectly aim for the protection of people's actual functionings.

This doesn't mean, however, that effective access to justice should always be interpreted as a capability, and *never* as a functioning. There are easy cases: victims of crimes should typically be afforded legal protection even if they do not choose to seek it.

Or, in a legal system, which has abolished (like most modern legal systems, at least in the criminal domain) regulations of legal proof, confessing to a crime that one did not commit, does not make it compulsory, for the judge, to find the confessor guilty. The truth of what one says in court is not something that can be disposed of by private individuals. Furthermore, having one's claim be heard by an *independent* and *impartial* judge, *once* one has chosen to have his claim be heard by a judge, is not something one can opt out from. In all these cases (granting legal protection to the victim of a crime, convicting someone on the basis of reliable evidence, judging cases with independence and impartiality), reasonable public policies should typically aim for granting a specific functioning to their beneficiaries, no matter the latter's choices.

But there are hard cases too. First, should we allow parties to contract themselves out of the rights and privileges that the legal system provides them with, and the equal accessibility of the public forum that is designed to adjudicate such rights and privileges, in exchange of some *other* service that could be offered to them (like, for example, an affiliation to a specific profession, like the military, whose regulations typically create *ad hoc* proceedings for handling a large portion of disagreements among their members, which would be otherwise subject to general legal regulation; or, affiliation to a religious group which has instituted special courts and proceedings; or, the provision of cheaper consumer goods, like we do with arbitration clauses)?

Second, suppose that you agree that Governments are under an obligation to recognize a general right to counsel, in *all* judicial proceedings. Should we then allow parties to refuse the assistance of the publicly provided counsel? Or, should we recognize a *duty* to all parties to judicial proceedings to have the assistance of counsel? Put more

generally, should we allow parties to refuse the delivery of a service that we otherwise consider to be an essential requirement of basic justice? I have taken up this question (at the end of chapter 1), while discussing the possible roles that the ideal of human agency in legal affairs might play within arguments about equal access to justice. A categorical right to self-representation, I argued then, confuses unfettered discretion over litigation choices with equal access to justice, and, thus, according to the approach developed here, it could be appropriately restricted when a host of conditions apply in a given jurisdiction.

Third, law is a public good, which means that, at times, some of the social benefits that a correct resolution of one case produces, extend to even non-parties to the dispute. Deterrent effects are a case in point. A victim who can extract an adequate punishment from a defendant produces benefits to others as well, through both general as well as special deterrence. But, at times, even private parties bargaining a resolution of their disagreement, as it is said, in the shadow of the law, can produce these same benefits (at a lower cost). So, should we allow parties to privately adjudicate their claims, even when the correct (from a legal point of view) resolution of these claims produces social benefits to others (non parties to the dispute)? This is a topic for chapter 8, on the legitimacy of group litigation. I have also suggested some tentative analysis and a general framework to think through the impact of these positive spillovers on the market for lawyers in chapter 7.

I will say much more on some of such general classes of cases in Part III of this essay, which shall provide four practical tests for the political principles that will be presented in the next section. For now, let us simply notice how a CA can give one an

elaborate framework for thinking well about them. The critical issue, as we shall see, is to determine the impact of regulating one way or another rights and duties in access to justice (protecting choice, or imposing specific levels of actual functionings) on one's general capabilities, as well as on the capabilities and functionings of others. Does allowing choice limit concrete exit options to the chooser and thus indefinitely preclude the *future* enjoyment of valuable capabilities? This is relevant for analyzing rules, which permit parties to contract out of the legal system. Is there a way in which we can design the delivery of an essential service, without limiting people's choices or capabilities? This is the case of the duty to have the assistance of a lawyer. Does allowing choice to the parties of a litigation over what an acceptable solution to their case looks like, harm the capabilities of non parties? This is the case of two parties bargaining a resolution of their disagreement in the shadow of the law.

6. A human right, a social duty, or a capability? A reprise.

Chapter 1 of this essay began by asking whether the overarching aim for a theory of equal access to justice should be the formulation of a separate body of human rights law (a new core treaty, perhaps) specifically detailing the content of a coherent system of access-rights.

However, chapter 1 also argued that a reasonable theory of equal access to justice should meet the following challenges, before aiming directly for a unified account of a general human right of access to justice:

A) Political theorizations about equal access to justice must keep a running account of the respective benefits and costs of different avenues and forms of

contestation and claim making, within and beyond formal litigation, and integrate recognized entitlements within a systematic understanding of personal duties and responsibilities;

B) Political argumentation in access to justice needs to consistently integrate the thought that people have justified claims to *both* specific prohibitions against interfering state action, as well as to affirmative institutional and material support, and it needs to offer guidance on how to accommodate these two sets of claims in consistent ways.

C) Political theorizations about equal access to justice should not pre-empt serious discussion on the extension (or restriction) of substantive entitlements to beings which are *not* human persons, but rather remain adequately responsive to changes in substantive laws and regulations.

Does a strategy based on the recognition of a pre-political obligation fare any better than one based on a pre-political entitlement (like a human right)?

6.1. The content of the duty: ‘at times’, ‘provisionally’, ‘pause’, ‘cool down’, and ‘listen’.

Before we actually get to this question, I need to say more on the content itself of the social duty, which, in the alternative account which I am pursuing, grounds the recognition of legitimate demands for equality in access to justice; I also need to say more on the exact relation between such duty and the other relevant capabilities, whose protection a CA should be designed to justify and support. Once we are there, we will have moved a long way toward developing a theoretical framework, which could help us to address the practical challenges listed above.

There is an all-important, and very common, objection to almost *any* demand in access to justice, especially *whenever the claim is made by a lawyer*. Sure, access to justice is important and the idea of equality in access has an intuitive appeal. But you are overselling the point, and for obvious reasons: you are a lawyer, and lawyers stand to gain, in one way or another, by any shift in public perception, which assign a relatively higher value to access to justice – that’s, after all, precisely the service, which lawyers are selling.

The argument is clearly *ad-hominem*, so it should *not* be taken at face value. But it does track a reasonable hypothesis, which could justify at least some initial skepticism about lawyers’ enthusiasm in access to justice. Just like a telescope might look very different to the astronomer, from how it looks to the laymen, access to justice could very well look very different to lawyers, from how it looks to the laymen: the salient features of the object of one’s profession might look very different from the salient features of the same object, as observed by the layman. Just like an astronomer might fail to understand that a telescope with aperture more than half a meter wide might not necessarily be the most wonderful (and useful) object to display in one’s living-room (while still remaining an enormously valuable object, at least financially speaking); a lawyer, on his part, could be especially blind about the significant costs, which access to justice might cause to the laymen, and miss the telescope in the room almost entirely.

Correspondingly, the strategy to ground the institutional protection of equal access to justice on a duty is designed with the explicit intent to give immediate and unequivocal salience to the significant costs, which access to justice might cause. A CA helps us again here: a workable list of fundamental capabilities not only gives us goals

for reasonable public policy, but it also points to important areas of social life, which we should protect against the possible harms of access to justice itself. By giving us rich descriptions of which real opportunities for achievements mark a life that it is going well, capabilities lists give us a *point* for recognizing a social duty to, at times and provisionally, pause, cool down, and listen, as well as a salient and fine-grained account of which harms its recognition could cause. Or so I claimed so far.

But why the insistence on a social duty then: aren't capabilities enough? And how should we understand the relation between the two concepts anyways?

Let us inspect the content of the duty itself, by breaking up its constituent parts. Demands for equality in access to justice are grounded on a duty to, I have argued, 'at times and provisionally, pause, cool down, and listen'.

Consider 'pausing', and 'cooling down'. Combined, the two actions are meant to stress the salience of a few big costs, connected with access to justice – 'time', 'distraction from otherwise valuable activities', 'opportunity losses'. But we do not merely demand for others to 'pause'. They ought to *cool down* as well, creating some practical distance (enough for intelligent deliberation to take place) between themselves and the activities that they are pursuing.

The two initial qualifications to the actions which we demand others to perform – we, '*at times*' and '*provisionally*', demand that ... – are meant to underscore that reasons ought to be offered for triggering the recognition of such duty; *and* that such reasons ought to justify our holding on to, or delaying, the realization of activities that we otherwise find valuable, and attractive. But we should *not* expect these reasons to be *sufficiently* persuasive as to the desirability, or legitimacy, of the substantive action they

purportedly justify – assuming this much would defy the whole purpose of recognizing a duty to pause, cool down, and listen: if we are *already* persuaded as to the desirability, or legitimacy, of a demand made on us, then we ought to do *that*, without having to pause, cool down, and listen.⁷ What we are entitled to expect is, rather, that these reasons meet an appropriate threshold of plausibility, and/or are connected with an area of one's life, where we could both expect, and justify, social cooperation to take place.

Some reason ought to be given, however: from the point of view of the claim-maker (and, thus, from the point of view of someone who chooses to comply with the duty) we *provisionally* pause, cool down, and listen because we are generally entitled to compare the expected benefits and costs of claim-making, in light of the demands that the duty makes on us. From the point of view of the person who is the subject of the claim, we *provisionally* pause, cool down, and listen, because we are entitled to demand that the claim-maker does not withhold the recognition of *his* duty to pause and listen.

Finally, there is the activity, which provides a point, a context, and a justification to pausing and cooling down – ‘listening’, that is. So, recognizing such duty commits us to protect and develop a communicative interaction between at least two beings. One who does *some form* of ‘talking’, directed at claim-making, and one who does the ‘listening’. Here, we should be immediately careful about four things, especially.

First, the recognition of the duty doesn't presuppose an adversarial, confrontational context. If it did, it would leave us silent with respect to a host of social contexts where access to justice *doesn't* imply the existence of any specific adversary, or

⁷ In a litigation setting, this is most clear in the case of the defendant: if you agree with the plaintiff's theory of the case, then in the most general case, you ought to (reminder: this is a *moral* ought) comply with his demands, without having to pause, cool down, and listen. But it is also true in the case of the plaintiff: if you are persuaded that the defendant's theory of the case is persuasive, then you shouldn't pause, cool down and listen: you ought to (again, a moral one) drop the case altogether.

of any direct confrontation with another person, or being. In these cases, we still impose a duty to pause, cool down, and listen, but we do not allocate it to one's 'adversaries', and in a confrontational setting.

Second, the communicative interaction, which provides the duty with a point, a context, and a justification, does *not* presuppose communicative *discourse* by rational human adults. Surely, we have reasons (stemming from both basic fairness, and effectiveness) to *restrict* the imposition of the duty to those (and only those), who can actually shoulder its burdens. And, *to the extent that* we believe that human rationality in adulthood is a *necessary* requisite for the capacity to comply with the duty, then rational human adults are the only beings, who ought to bear the burdens of the duty. This *doesn't* mean, however, that we ought to symmetrically restrict the acquisition of the benefits of discharging the duty to rational human adults *only*. All we need, in order to at least consider the possibility of extending the recognition of benefits beyond rational human adults, enmeshed within perfectly symmetrical relations, is to detect basic intelligibility of expressive behavior, since the latter is enough for giving 'listening' a point, a context and a justification – and that *could* be enough for triggering the relative demand.

Third, we understand the duty to be a *moral* one, because we tie its recognition to a moralized interest in a human function (the ability to disagree with others, without compromising the reasons which justify social cooperation), which Nussbaum's evaluative description of the human animal condition, I argued, supports and universalizes across cultural variations. *And* we understand the duty to be a moral one, because we do *not* demand its direct institutional enforceability. Rather, we demand that

appropriate conditions are met, so that duty bearers can discharge their obligations, and fairly distribute their social benefits.

Finally, whenever we recognize a duty to pause, cool down, and listen, we authorize someone (the beneficiary of the duty itself) to impose costs on others. These costs are, in turns, connected with the beneficiary's power to make its voice *count* in public decision-making. That's the point of recognizing the duty itself – we pause, cool down, and listen *because* we want one voice to be heard, and made count, in public decision-making. Access to justice, on this account, is a social tool through which we authorize someone to expose others to the costs of pausing, cooling down, and listening, for the sake of his claims. So, we demand *equality* in access to justice, because we understand that access to justice (the set of institutions which give practical content and coercive force to the duty) is a possible threat to equality itself. Unfair, and socially coerced, allocations of the duty are one distinctive trait of non egalitarian social relations generally, whenever one individual, or a group of individuals, is systematically exposed to the costs of pausing, cooling down, and listening, in order for other people's claims to count in public decision making. What we need then is an account of inequality, which can adequately explain and justify when, and why, the duty is unfairly allocated among individuals and social groups.

All in all then, the duty to, at times and provisionally, pause, cool down and listen performs a similar role, which *care* plays in Nussbaum's version of the CA. According to the account given here, the duty and the correlative human function, which it is supposed to protect, like care in Nussbaum's account, are "not a single thing, and therefore [...] should not be, or at least need not be, introduced as a single separate extra capability in

addition to the others” (FJ, 168). Also, thinking well about the duty, and its correlative human function, just like thinking well about care, “means thinking about a wide range of capabilities on the side of both [...]” the duty bearer and its beneficiaries (FJ, 168). Just like care in Nussbaum’s account, the duty and the correlative human function, which it supports, constitute a primary demand of justice in the account proposed here, notwithstanding the fact that neither one of them figures, explicitly, in the list of fundamental capabilities.

6.2. A social duty, or a human right?

So, how is all this helpful at all in meeting the challenges, which, I argued, the alternative strategy based on understanding access to justice as a human right has a hard time to confront?

A) Do we have a better account of the costs and burdens of claim-making? Can we more easily integrate analysis of different avenues of claim-making and contestation, within and beyond formal litigation itself?

I said a lot already about how thinking about the duty and its correlative human function helps us to think well about appropriate limits to access to justice, by highlighting the costs connected with its recognition. The point of grounding the demand for the protection of *equal* access to justice for all on a social duty is precisely to make clear that access to justice is a costly and burdensome political goal, which might *directly* threaten equality itself. We use Nussbaum’s list of fundamental capabilities, and we think of possible suitable refinements and specifications to it, in order to identify the harms and benefits of the specific political institutions, which we create in order to defend equal

access to justice, and protect the institutional specifications of the duty to pause and listen. Access to justice ought to be limited in light of the harms, which it causes to people's fundamental capabilities; it also ought to be limited in light of the harms, which it causes to their equal and shared enjoyment.

Furthermore, the strategy designed here avoids the trap of expressing a preference for formal institutions, against so-called informal ones, as the best avenue for fair dispute resolution, in two ways.

First, as I mentioned, we understand the duty to, at times and provisionally, pause, cool down, and listen, to be a *moral* one because we do not demand its direct institutional, coercive, enforceability. Rather, we demand that appropriate conditions are met, so that duty bearers can discharge their moral obligations, and fairly distribute the ensuing social benefits. This allows us to value, and rank, both formal *and* informal proceedings *instrumentally*, by monitoring their respective impact on the creation and support of the appropriate conditions, in which duty bearers can discharge their obligations, and fairly distribute their social benefits. We do *not* search for any intrinsic feature of either formal or informal justice, but assess directly their conditions of application in any given jurisdiction.

Second, this strategy entirely avoids a dangerous juxtaposition of two otherwise different distinctions – namely, the distinction between adversarial and non-adversarial procedures, and the distinction between formal litigation, and alternative dispute resolution. It is, first and foremost, an historic mistake to understand these distinctions as coextensive. There has been plenty of non-adversarial formal litigation (for better or worse) in world history, and there certainly could be a lot of adversarial alternative

dispute resolution. What we should do then is to try and identify *which* specific institutional features (within adversarial, non-adversarial, formal, or informal dispute resolution), in which concrete social contexts, give us the best chance to create and support the appropriate conditions, in which duty bearers can discharge their obligations, and fairly distribute their social benefits. Chapter 14 discusses how the value of one of such institutional features (namely, publicity in adjudication) within one specific social context (socially patterned violations of legally protected interests) condemns the legitimacy of confidential settlements in fair dispute resolution. Chapter 15 analyzes the complex interactions between legal and extra-legal activism in one important moment of the civil rights movement, and elaborates on the value of formal litigation within the larger context of reformist social movements.

B) Does the recognition of a duty to pause and listen allow one to consistently integrate the thought that people have justified claims to *both* specific prohibitions against interfering state action, as well as to affirmative institutional and material support?

There are three relevant steps here. First, we begin with a list of central capabilities, and we understand these as imperative *goals* for public intervention. This means we use their realization and protection both as a standard upon which we evaluate how well, or badly, one political community or other organizes its public institutions, as well as a constraint on everything else one political community or other wishes to pursue and accomplish – failure to realize and protect these capabilities for everyone is a failure of basic justice, no matter the many other wonderful things we are doing as a political community. As such, these capabilities are real opportunities for action, thought and

achievement and their realization does not consist in a merely formal recognition of institutional capacities and powers – which means that their protection involves material and institutional support. They are, generally speaking, capabilities, and not functionings, which means that such institutional and material support is integrated within strong protections against third-party interference.

The second step specifies the central questions in access to justice: whenever we can identify a threat (actual or potential, real or merely perceived) to anyone of such central capabilities, how is the actual power to make others pause, cool down and listen allocated within the relevant political community? Does this allocation affect (both presently, or potentially) the exercise or the enjoyment of anyone of the central capabilities? If so, how?

This is an ‘ancillary’, or ‘adjective’ step. Our identification and understanding of unfair allocations of the duty and the relative power depends upon our identification and understanding of a list of central capabilities. As such, whatever it is that we decide to do, once we have identified an unfair allocation of the duty and the relative power, will involve both demands for material and institutional support (since the ultimate goal is a real opportunity for action and achievement) as well as demands for prohibitions on interference (since the goal is a capability, not a functioning). Also, evaluative descriptions of present allocations of the duty and the relative power qualify our understanding of the central capabilities and, thus, our understanding of how material and institutional support should be integrated within prohibitions against interference. We gain a qualified understanding of the importance (and the basic conditions of realization, in one society or other) of the capability ‘bodily integrity’, and its relation with the

capability ‘senses, imagination and thought’ and with the capability ‘emotion’, as we investigate the effects of different combinations of interferences with, and support for, a person’s choice to report a sexual assault, and to act on the corresponding legal claims.

Finally, the third step specifies the institutional questions, as we shall ask: How does the current allocation of access rights affect the allocation of the duty to pause and listen, and the relative power, and, thus, the exercise and enjoyment of the central capabilities? And again, this step calls for an extensive integration of prohibitions against interference within institutional and material support. We *begin* with a threat to a central capability and a potential demand for institutional and material support – and we then account for the conditions, which explain why such support is, or is not, forthcoming.

C) Does the recognition of a duty to pause and listen pre-empt serious discussion on the extension (or restriction) of substantive entitlements to beings which are *not* human persons? Or does it rather remain adequately responsive to changes in substantive laws and regulations?

I have already mentioned the key move, which the approach proposed here attempts. The communicative interaction, I have said, which provides the duty to pause, cool down, and listen with a point, a context, and a justification, does *not* presuppose either communicative *discourse* by rational human adults, or symmetrical relations between equally powerful beings. This means that, diagnostically, we should begin by identifying who, in any given jurisdiction, bears the duty to pause, cool down, and listen (and in which context, and why); and, correlatively, by identifying who has the power to impose the costs of the duty to others. We use a CA to evaluate which, and whose, capabilities the current (*de-facto*) allocations of the duty either protect or harm. Then, we

move, prescriptively, to identify where to re-locate (if we must) the duty in order to protect its correlative human function.

Admittedly, this doesn't provide any definitive answer on how far exactly the duty should be stretched. But the all-important point is that we do *not* have to presuppose perfectly symmetrical relations in order to identify unfairness in current allocations of the duty, nor do we have to presuppose them whenever we advocate for an extension of its benefits. As long as the account of social justice that we choose, *or* valid legislation in the jurisdiction we are commenting on, extend the institutional protection of one substantive interest or another to new categories of beings, beyond its current restrictions, then all is really set for the duty to kick in and begin to do its work. On this account then, the demand for equal access to justice either follows, most directly, from the extension of the demands of substantive equality across categories of beings; or, minimally, it follows from the institutional protection of access to justice for even a restricted class of beings – either way, we demand *equal* access to justice in order to fairly allocate the power to make others pause, cool down and listen, and protect them against the cost of its exercise.

11. THE INSTRUMENTALITIES OF EQUAL ACCESS TO JUSTICE

DEFENDING DEMOCRATIC VALUES OF COOPERATION

1. Access to justice and social justice.

Part I of this essay discussed the basic conceptual, as well as empirical, tools which all reasonable approaches to equal access to justice need to give an account of, in order to get off the ground; then, Part I criticized specific historical approaches to access to justice, by testing how well (or badly) they meet the explanatory challenges identified in the first few chapters.

Part II then begun by taking a closer look at, especially, Nussbaum's version of a CA, and argued that the political conception of the person, from which, she argues, political principles should grow, helps one to identify the specific human function which makes equal access to justice valuable to us – namely, the ability to disagree, while preserving, or even extending, social affiliations. Our human, moralized, interest in protecting such function, chapter five argues, grounds a pre-political duty (namely, the duty to, at times and provisionally, pause, cool down, and listen) which should motivate the intellectual formulation of, and practical engagement with, specific political commitments in the field of access to justice.

The task, now, is to begin work on the development of concrete political principles, which could give practical content to, what I called, the duty to, at times and provisionally, pause, cool down, and listen. What we need, then, is a coherent and

persuasive perspective on the specific *harms* which systematic denials of access to justice produce as well as the articulation of the argumentative resources, which political activists could reasonably use, in order to criticize the ways in which legal services are actually distributed across the relevant population, and which could mobilize the political and social support, which is required for institutional reform.

Part I presented four standard argumentative strategies (access to justice as implied by the ideal of government by consent, access to justice as a requirement of fair adversarial procedures of adjudication, access to justice as a welfare right, and access to justice as an essential component of the rule of law), but concluded that while each of them tells us something of great value on *why* we should care about access to justice, none of them is actually powerful enough to address all the challenges one faces in providing a solid theoretical foundation to equality in access to justice. What we need now, then, is overarching principles that could give a systematic structure for all our different concerns.

Chapters 2 and 10 alluded to an ideal of equality in social relations which, I anticipated, might provide a reasonable normative interpretation of equality in access to justice, as well as critical guidance for the empirical observation of the quality of legal services and their fair distribution in a given society.

Both the ideal and its role in grounding the idea of equality in access to justice need to be spelled out more clearly now, in order to show how, and the extent to which, they can actually solve the difficulties that any approach on access to justice has to face before it can claim intellectual authority in organizing our thoughts and actions in the field. On this view, as we shall see, equal access to justice is a trait that qualifies social

relations, by pointing to some features of claim-making under the law of a democratic community.

Relational egalitarians conceive inequality as social disadvantage and consider it unjust whenever it “reflects, embodies, or causes inequality of authority, status or standing”.¹ They understand a free society of individuals as one where “mutually accountable individuals [...] regulate their claims among one another according to principles that express and sustain their social equality”², and whose authority would be accepted (or not rejected) by free, equal, and reasonable people. Relational egalitarians seek the abolishment of hierarchical relations in public cooperation. And, when this is not possible for the realization of common ends, they seek to impose constraints on such relations by establishing public institutions that should limit the scope, ends and grounds of legitimate commands. Crucially, they *test* the value of public institutions by assessing the extent to which the latter protect people against social disadvantage; realize the social epistemic conditions that assure that the interests and demands of all members are given equal weight and consideration; and express equal concern and respect to everyone.

So, in order to assess the possible uses of the ideal of equality in social relations in interpreting the value of equal access to justice, we need to investigate the instrumentalities of access to justice in pursuing the goals of public institutions, as listed above. As I shall try to show in the next few pages, the ideal of equality in social relations allows one to get a clearer perspective on the different dimensions in which *equality* matters for access to justice: as *the* ground on which claims demanding recognition of

¹ See E. Anderson, *The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarian*, in 36 CANADIAN JOURNAL OF PHILOSOPHY 1 (2012); see also E. Anderson, *What is the Point of Equality?*, in 109 ETHICS 287 (1999).

² E. Anderson, *The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarian*, in 36 CANADIAN JOURNAL OF PHILOSOPHY 1 (2012), at 3, n. 4.

specific rights of access are based; as a *criterion* that allows one to choose *which* capabilities such rights should be designed to protect and support; as a *threshold* that defines adequacy standards for the concrete development of such capabilities; and, finally, as a *formal standard*, which grants equal opportunities to use laws as grounds for social criticism.

Let's begin with the ideal of 'Government by consent', which, as I have remarked already, links the recognition of specific rights of access to the legitimacy of authoritative commands. On this view, authoritative commands are fraudulent, when its subjects are given *asymmetric* opportunities to make claims on their basis.

A number of difficulties immediately appear, however. As I have already noticed, the ideal of 'government by consent' and the interpretation of specific access rights as instrumental to its protection may even block (in light of reasonable concerns over the legitimacy of courts as avenues for structural reforms) the richer definitions of equality in access of justice that we are after. In particular, the invocation of the ideal of 'government by consent' would, at best, commit governments to a merely *formal* understanding of their duty to secure equal access to justice for all.

So, how can one get from a merely *formal* understanding of Government's commitments in the field of access to justice to a more nuanced, and *substantive*, view on what people can actually be and do, by engaging with legal rules in their conduct?

At this point, one needs to insert a theory of social justice – one, that is, which is aimed at connecting (and at providing a point for) the recognition of formal opportunities, to concrete substantive achievements. On this reading (historically represented by the attempt to ground specific rights of access to justice alongside the constitutionalization of

so-called welfare rights), specific access rights are justified in light of their instrumentalities in protecting or realizing concrete substantive achievements. It could hardly have a point, for governments, to promise the enactment of expensive social programs, or regulate the delivery of services to the population, in virtue of their social value, and then to inhibit the full enjoyment by all of the opportunities so promised.

And yet not all theories of social justice (that is, theories that attribute some value to the concrete substantive *results* of social cooperation) are apt to the task. For one thing, notice that even though, in this interpretation, the good of access to justice is in a sense contingent, or dependent, on the good that is protected by substantive law (since its recognition follows from the recognition of its instrumentality in realizing the goals of the latter), its evaluation should not be correspondingly reduced to it. The intuition here is that there is a distinction between one's actual realizations (no matter one's explicit or implicit choices), one's real opportunities to achieve some realizations (no matter one's actual pursuance of such realizations) and the ability to articulate claims about, and effectively stand up for the legal protection of, both one's actual realizations, as well as one's real opportunities to achieve specific realizations. The distinction between the first two tracks the distinction between capabilities and functionings, whereas the one between the former and the third tracks the value of access to justice, as a way of engaging with one's own goals and opportunities to achieve them, through the competent use of legal rules. Thus, we need a theory of social justice that, at the very least, can adequately capture such distinctions.

Consider luck egalitarian theories of social justice, which conceive social justice as a pattern of distribution of divisible (or non-relational) goods, that public institutions

should be designed to protect, or achieve, or create the conditions for achieving, by correcting (or ameliorating) the accidental (or morally arbitrary) causes of individuals' disadvantages.³ At least one historic argument on equal access to justice (namely, access to justice as a welfare right – on which, see Part I, chapter 3) seem to rely on a luck egalitarian understanding of the demands of equality in judicial proceedings: we should protect equality in judicial proceedings, because we should protect people against accidental (and thus, morally undeserved) vulnerabilities. Indeed, a luck egalitarian understanding of social justice appears to track many of the most popular distinctions elaborated by most legal systems to govern the allocation of specific access rights. Consider the distinction between criminal and non-criminal proceedings (which governs the delivery of legal aid in the US, categorically recognizing a right to legal counsel in a subset of criminal proceedings, while mandating a complicated utilitarian calculus in all others), or the distinction between plaintiffs and defendants, and the distinction between cases in which the indigent party *must* use courts to achieve a particular legal outcome (say, divorcing from her partner) and cases in which the indigent party enjoys alternatives to the use of courts (say, demanding the execution of a contract) – the two distinctions, with some approximation, jointly govern the waiver of access fees in US Federal Courts; they also appear in many precedents of the European Court of Human Rights.

The rationale for such distinctions can be easily interpreted as protecting parties from *accidental* encounters with the legal system (like being accused of a crime, or appearing as a defendant in a proceeding initiated by others, or being forced to use courts to resolve some dispute), on the understanding that in all such cases the indigent party is

³ See, for an illustrative example, G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* (2008).

seeking protection from an event that she has not sought, or caused, and that, in any case, does not depend on her choices.

Such rationale is weak, and counterintuitive, however: a career criminal may well expect to be caught, eventually, and being accused of a crime is certainly *not* an accidental event, in *his* case – that is the kind of life he chose. Similarly, the negligent parent, who is party in the proceeding determining his child’s custody, is might not be a ‘victim’ of any accidental event. On the other hand, the plaintiff who bought a damaged consumer good is a victim of an accidental event – the disadvantages that follow from his participation to a trial adjudicating his claims against the sellers are certainly not his fault. So, luck egalitarians would rather spend the marginal dollar in protecting the consumer, rather than the career criminal, or the negligent parent. But that seems too harsh on victims of bad option luck (such as the criminal, or the negligent parent) and too generous with the unfortunate consumer. Indeed most legal systems accord some preference (in, for example, the allocation of free legal aid) to the criminal defendant.

The un-persuaded luck egalitarian might argue, with reason, that the consumer is *not* really the victim of an accidental event since non compliance with contract obligations is a risk that follows one’s participation in any market of goods and that, in any case, the point of access to justice should *not* be to protect people from the harms of trials; but, rather, the point of trials is to protect people from the harms of accidental disadvantages in general. Thus, the arguments might run, we should recognize access rights in light of their instrumentalities in protecting people from brute luck in the distribution of goods, in general.

This seems a much more reasonable, and straightforward proposal. But notice: for one thing, in this way one loses the very possibility of evaluating the autonomous value of access to justice and its directly constitutive role in shaping one's disadvantages. Also, no matter what one chooses as the most appropriate space or informational focus for judging disadvantages (capabilities, or functionings, or welfare, or resources and so on), access to justice points to one's relation with such 'goods' and, in particular, the kind of *social* relations one is able to enter into while protecting such 'goods' – like, for instance, one's relation with those who threaten to impede the enjoyment of such goods, as well as one's relation with those who are ready to help. In sum, we need a theory of social justice that provides both standards as well as adequate ways to describe and criticize such relations, no matter its final preferred criterion for judging social disadvantages in general.

Consider now the alternative relational egalitarian proposal. We should begin with a list of substantive freedoms and opportunities that Governments are under an obligation to protect and nurture, and then ask, 'which concrete capabilities in claim-making under the law, are constitutive of one's enjoyment of such substantive freedoms and opportunities?', and 'which capabilities in claim-making under the law are *instrumental* for the protection of such freedoms and opportunities?'.

Notice that this does not require complete *equalization of functionings* in legal proceedings ('everyone should have an equal distribution of error rates across all trials he or she participates in'; or 'everyone should appear as plaintiff and defendant in exactly the same number of trials as everyone else'), nor complete *equalization of capabilities* in the legal process (everyone should have the *same* amount of 'legal knowledge' and an

exactly *equal* amount of resources to leverage it), however. What it mandates, rather, is the protection of the threshold level of capabilities, which is sufficient to protect and nurture the substantive freedoms and opportunities we want to expand, or protect.

Also, to claim that, for example, one country should expand equal access to justice for the right to health care might *not* mean that such country should necessarily recognize a *justiciable* remedy for any violation of the right to health care. But focus on the *combined* capability to access to justice for the right to health care allows one to concentrate on the distinct rights that can be made justiciable (without, say, compromising courts' institutional competency or legitimacy) while *at the same time* viewing their *combination* as directly instrumental for the protection and expansion of the right to health care.

Finally, notice that a relational understanding of the demands of equality easily explains one's *political* interest in the pre-political duty to, at times and provisionally, pause, cool down, and listen, in at least two senses. First, in diagnostic matters, the identification of who has the concrete power (and over whom, and why, and in virtue of what) to make other people *pause* whatever it is which they are doing, and *listen* to their concerns in matters of common interest, is precisely what should worry relational egalitarians. Unequal social relations are, precisely, those relations in which one person, or group, is formally, or even merely de-facto, authorized to impose on others concern, or even merely attention, to its interests and concerns, *without* the need to appeal to a justification which could be endorsed and agreed upon by all, in virtue of their equality. Second, in prognostic matters, it is precisely by reforming the institutional and social conditions which determine who has the concrete power (and over whom, and why, and

in virtue of what) to make other people *pause* whatever it is which they are doing, and *listen* to their concerns in matters of common interest, that relational egalitarians should implement their progressive agenda. The goal of egalitarian social movements is precisely to take a weak signal (a legitimate demand which is not, however, listened to by powerful groups) and transform it in a compelling, and visible, argument for reform.

These thoughts already take us far along in the path of identifying the two remaining principles of equal access to justice, which this chapter shall now discuss – Namely, the epistemic value of access to justice (since what identifies non egalitarian relations is precisely an unfair allocation of the duty to, at times and provisionally, pause, cool down, and *listen*, then it is by modeling access to justice as a means to protect social equality that we can exploit the epistemic value of equal access to justice), and the expressive value of access to justice (since the goal of egalitarian social movements is to reform unfair allocations of the duty to, at times and provisionally, pause, cool down, and listen, then it is by modeling access to justice as a means to protect social equality that we can appreciate the expressive potentials of equal access to justice).

2. The epistemic value of access to justice.

According to relational egalitarians, public institutions are not simply designed to aggregate and then execute the will of legitimate majorities. They provide, also, the institutional context for, and formal authoritative reach to, cooperative social *inquiries* carried out by citizens in matters of common concern.⁴ On this reading, democratic institutions are designed, also, to take advantage of the epistemic diversity of citizens, enriching the informational and evaluative base on which public deliberation takes place.

⁴ See E. Anderson, *The Epistemology of Democracy*, in 3 *EPISTEME* 8 (2006).

From this point of view, the good of access to justice should be assessed in light of its instrumentality in nurturing and protecting the epistemic powers of public institutions.

This is fairly easy to show, assuming that judges are wise and sympathetic people, selected in virtue of their reflective capacities and moral qualities, trials are initiated by citizens who are motivated by genuine doubts about their rights and obligations, and substantive laws at least formally approximate the content of citizens' political and moral rights vis-à-vis each other and the state. In this scenario, trials themselves become intelligent social experiments, *testing* the current point and reach of public morality, and stretching public reason as far as it can go, given the legal material available in the country, in the resolution of genuine conflicts and disagreements between citizens, or between the latter and the state. If courts are exemplary institutions of public reason (in Rawls' famous phrase, referred to Supreme Courts), then protecting equality in access to justice assures that each and everyone's claims and contestations formally based on the law of the land, is afforded a real opportunity to effectively *contribute* to public reason, in matters that may deeply affect one's life. Correspondingly, the duty on the part of a government would be to assure that each and everyone of its citizens or the people subjected to its laws, meets the threshold level of capabilities in access to justice that are required for granting that one's claims and contestations can be *heard*.

But one doesn't need any of such heavy assumptions to appreciate the potential instrumentalities of access to justice in protecting the epistemic capacities of public institutions. There is no need for assuming the reflective and moral capacities of judges, nor the substantive justice of legal rules: all one needs is that decisions can be at least retrospectively assessed and discussed. Access to justice, in this scenario, assures that the

official *answers* to people's legal claims – however bad, or misconceived, or simply unjust that they might turn out to be – are 'put down on paper', kept 'on record', and can thus be used for social commentary, or criticism, or even for steering agitation. This still assumes that trials are actually initiated by citizens who are motivated by genuine doubts about their rights and obligations. But the latter assumption can be easily let go as well. There is no claim here that capabilities in access to justice above the threshold, which social equality demands, cannot be wasteful of public resources and even harmful to the general capabilities of others. Or, that we should live with the consequences of constant legal harassment through frivolous litigation, no matter its social cost. On the contrary, what we should say is that each and everyone's combined capabilities to articulate claims should meet the threshold level that is required in order to assure that each can effectively contribute to public reason, when 'public reason' is being exercised to adjudicate cases that (either directly or indirectly) affect one's substantive capabilities. Above the threshold, the protection of equality in access to justice, does not commit governments to finance (or even protect) one's opportunities to waste public resources in frivolous litigation.

Also, the combined capability of access to justice directly *feeds* democratic discussion and public reason: very little can be gained from, or learnt by, a discussion on the opportunity of reforming a specific piece of legislation, or introducing a new one altogether, if the discussants know nothing, or very little, on the actual conditions that provide a point for, or allow, or impede, or simply hinder, one's capacity to invoke and make claims based on such piece of legislation – that is, if the discussants themselves cannot imaginatively see existent conditions, *along with* the possibilities of re-

organization and reform inscribed in legal rules. Furthermore, such discussion would have little point and relevance – indeed, it would be a mere fantasy⁵ – if each and everyone of the discussants cannot at least be presumed to be able to then *act* on the anticipated reforms promised by legal rules, if only to acquire situated and highly contextual information on the possible effects (within one’s own life) of following one rule or another. In societies as complex as contemporary capitalist democracies, whose day-by-day operations depend on the use of large bureaucracies (both private and public), these are not easy capacities to develop. On the contrary, they require attentive nurture and cooperation among many different agencies and institutions. Notice that this is so, no matter the specific contentious strategies (litigation, political mobilization directed at introducing new legislation, civil disobedience or even social revolt), one chooses in order to realize her reformist, or revolutionary, or conservative agenda (as long as we assume that one law or another will still be needed, in order to regulate social conduct) – which means that the expensive *costs* of programs which are intended to expand access to justice for all can and *should* be supported by people that otherwise endorse very different (and radically conflicting) social and political agenda, as long as (and to the extent that), they all share a minimal understanding on the need for a common plan on living together, within the constraints and freedoms specified by the *same* legal system.

3. The expressive value of access to justice.

Consistent efforts to realize effective access to justice for all in the space of capabilities have an *expressive* value as well, since they embody the ideals of a democratic culture. To see this, consider what the systematic *denial* of access to justice actually

⁵ Perhaps a ‘thought-provoking’, or ‘eye opening’, or ‘inspirational’ fantasy, but still a fantasy nonetheless.

communicates to members of a legal community (especially when it tracks other visible characteristics that distinguish citizens from one another, like race, gender, sexual orientation, culture, or class, or economic wealth): it invites the creation of distinct classes of citizens, ridiculing even law's purported claim to formal equality – no matter what the law formally promises, in such environment the authoritative force of laws could only be invoked when it protects one group and punishes another. No free and cooperative interaction between equals is possible, when the activities of some citizens are identified as beyond the reach of legal claims, and some are seen as the legitimate target of legal harassment – what could be even worse, systematic denial of access to justice invites the thought, among the excluded, that no legal or social reform could ever provide a solution to their predicament. Conversely, consider now what genuine and intelligent efforts in increasing access to justice for all say to all citizens: all claims, no matter how improbable or inarticulate or obnoxious the specific mouth that voices them, will be given an attentive ear and a peaceful forum. The further entrenchment of equal access to justice as a set of specific access rights, in turns, communicates that this should *not* be so out of the mere generosity, or goodwill, or benevolence of the powerful, but in virtue of a duty for which no excuses or thanks should be sought.⁶

Notice that credible commitments to access to justice may have an expressive value for political movements as well, and not only for public institutions generally. To

⁶ Reginald Smith anticipated a similar argument in 1919. See REGINALD SMITH, *JUSTICE AND THE POOR* (1919), at 10: “There exist today businesses established, conducted, and flourishing on the principle that as against the poor the law can be violated with impunity because redress is beyond their reach. [...] The effects of this denial of justice are far reaching. Nothing rankles more in the human heart than the feeling of injustice. It produces a sense of helplessness, then bitterness. It is brooded over. It leads directly to contempt for law, disloyalty to the Government, and plants the seeds of anarchy. The conviction grows that law is not justice and challenges the belief that justice is best secured when administered according to law. The poor come to think of American justice as containing only laws that punish and never laws that help. They are against the law because they consider the law against them. A persuasion spreads that there is one law for the rich and another for the poor”.

see this, consider what a credible commitment to equal access to justice says, when communicated by a political movement that, after a long and much contested period of political isolation and exclusion, is about to win the governing majority of the country: no matter how radical or even revolutionary the legal and social reforms proposed by such movement might be, a genuine commitment to equal access to justice shows that laws (both old and new) are tools that are available to all, and not only when they impose sanctions on deviant behavior, but also when they promise powers and benefits, without distinctions among personal or social affiliations, wealth or talent. What a credible commitment to guaranteeing access to justice for all shows, thus, is that at least two further constraints are recognized as authoritative over the *content* of substantive laws: that they will be available to anyone occupying any social position, and that they will attempt inclusive and peaceful (as opposed to marginalizing and violent) resolutions of social conflicts. If inspiring trust even to citizens who are generally hostile to such political or social movement is one of the latter's goals and objectives (realistically that might not be, of course), then a credible commitment to equal access to justice might help.

4. A brief summary – and an anticipation of the work ahead

We now have three general political principles, which jointly define the instrumentalities of equality in access to justice, for the protection of democratic forms of social cooperation – namely, equal access to justice as a means to protect social equality, equal access to justice as a means to nurture the epistemic capacities of public institutions, and equal access to justice as an expression of a democratic culture. This chapter presented a

few independent arguments for each of such general political principles, and tentatively showed how each of them might contribute to a reasonable political specification of, what chapter 10 called, the duty to, at times and provisionally, pause, cool down, and listen. Such political principles thus have now the epistemic status of a reasonable practical hypothesis – one, that is, which is ready for intelligent testing against current practice, its conceptual reconstruction, empirical understanding and, finally, against its criticism. This is the task to which Part III now turns.

PART III

PRACTICAL APPLICATIONS

TESTING THE POLITICAL PRINCIPLES OF EQUAL ACCESS TO JUSTICE

OVERVIEW

The aim of this section is to test the theoretical hypothesis proposed in Part II, against the *desiderata* for a reasonable theory of equal access to justice identified in Part I. In order to do so, the section discusses four classic fields in access to justice.

Chapter 12 discusses the content and the scope of the right to counsel, and the institutional mechanisms designed for the delivery of legal aid.

The chapter begins with a discussion of the challenges that courts have traditionally faced in trying to expand the coverage and scope of the right to counsel, as an element of equal access to justice for all (or, at least, its partial aspects which are explicitly recognized in national constitutions). In particular, the chapter provides an account of the different approaches followed by the US Supreme Court (before and after its decision in *Gideon v. Wainwright*), and by the European Court of Human Rights (in interpreting the requirements of art. 6 of the European Convention of Human Rights).

The analysis identifies two observation-concepts, which have been recently developed within a CA (namely, the idea of fertile-functioning and the idea of corrosive-disadvantage) and argues that both of them can play valuable functions in public discourse over the allocation of access rights (including the right to counsel).

Finally, I conclude by sketching alternative institutional models for the delivery of the right to counsel and, then, by proposing a tentative assessment of their potentialities and limitations, leveraging the practical insights of the previous discussion.

Chapter 13 discusses the possible uses of group litigation, as a tool for the protection of equal access to justice in a specific jurisdiction.

The received view on the purpose of group litigation is that the latter should aim at a comparatively more efficient fit between substantive laws and rights, and the outcomes of potential litigation, than the one which individual litigation can achieve: when we design group litigation, we limit party autonomy, alter standing rules, or rules of preclusion, in order to increase the prospects (and correspondingly reduce the costs) of effective legal protection for otherwise vulnerable interests and rights.

The aim of this chapter is to test the potentialities of the three political principles of equal access to justice in meeting a specific challenge to the *legitimacy* of group litigation as such. Group litigation is a threat to democratic legitimacy, according to such challenge, because it imposes illegitimate limits to one's right to a day in court, the protection of which constitutes a foundational component of public respect for individual autonomy and dignity. Extensive limits to such right threaten one's autonomy and thus harm the democratic legitimacy of public institutions, or so the argument goes.

The three political principles of equal access to justice, I argue, provide powerful justifications for the introduction of group litigation in any given jurisdiction and jointly explain reasonable concerns with democratic legitimacy in adjudicative procedures. In particular, this is what the three principles allow one to say: we *should* be worried about the democratic legitimacy of group litigation, in light of what specific distributions of

litigation costs can do to harm people's real opportunities to effectively vindicate their rights or interests, through valid adjudicative procedures. But these worries shouldn't *just* be used to check on the democratic legitimacy of group litigation as such. They are, also, exactly what *justifies* its introduction in any given jurisdiction.

In sum, the approach developed in this chapter agrees with the received view (and target of the legitimacy challenge), which sees the design of group litigation as fundamentally concerned with promoting efficiency in 'litigation units'. But, this chapter adds, this is *not* efficiency for efficiency sake. What we should demand is to protect democratic equality from the potential harms of inefficiency in litigation units.

Chapter 14 reassesses Owen Fiss' classic challenge to the legitimacy of settlement as a reasonable goal, and method, of dispute resolution in a given jurisdiction.

The chapter begins by analyzing a recent paper by Levmore and Fagan, which explicitly argues *against* Fiss and in favor of settlement (and confidentiality in settlements in particular) as an effective tool for the social protection of a significant class of rights and interests.

Surprisingly, this chapter finds that these two, radically alternative, ways of conceiving the value of formal litigation (and, conversely, the value of confidential ways of managing dispute resolution) share important and reasonable ground – indeed, Levmore and Fagan's more systematic take on the strategic interactions of litigating parties (either actual or potential) in a wide set of disputes and quarrels reasonably explains at least one big concern, which Fiss had with settlement (and judges' support of it) as a general practice of dispute resolution. Correspondingly, Fiss' explicit normative concern with social equality helps one to explain an important intuition, which Fagan and

Levmore seem to share, on when, its potentialities notwithstanding (under a number of exacting conditions), settlement (especially when confidential) should be seen as problematic.

More than thirty years on, however, Fiss' biggest worries about settlement are still justified. The most critical point, this chapter argues, is to distinguish between cases in which one party is engaging in an *individual* pattern of wrongdoing, from cases in which the party is engaging in a *social* pattern of wrongdoing. It is one thing for *one* party to have injured (in some suitably wide sense of injuring) multiple other parties, and quite another is for *multiple* parties to have systematically injured (that is, by enacting an entrenched social *habit*) multiple other parties. Fiss was right in distrusting settlements in these latter cases, even though he didn't single them out in a clear way (so that his paper is standardly understood, quite fairly, as arguing that *all* cases, which are litigated, display this feature, which is a clearly wrong statement). Most importantly, Levmore and Fagan's paper provides multiple examples (discussing, most prominently, cases of sexual harassment and abuse) and a clear analysis of when and why Fiss' distrust is still justified.

The three principles of equal access to justice help one to explain why. We are worried about social patterns, because we are worried about social inequality, and we consequently should model access to formal litigation as an instrument, which helps people to disengage from non-egalitarian relations; which protects public institutions' epistemic capacities; and which expresses a democratic culture in dispute-resolution.

Chapter 15 takes up one big question, which political activists (and scholars in law and the social sciences) have long begun to consider, but tries to answer it in a most

provisional, tentative and piecemeal way. Whenever a political or social movement wishes to affect a structural transformation of a well entrenched social practice, which (purportedly) unfairly burdens one or more relevant social groups, should it best invest its resources (financial, human, or otherwise) to standard political activism and campaigning aimed at producing fresh legislation, or should it rather invest them in a litigation strategy aimed at a court order (or a series of court orders), which could directly engage one foundational element of the social practice itself?

In order to think well about the possible practical advantages of either one of such strategies, this chapter zeros in on one specific historical moment of both judicial and political activism: the events surrounding the Selma March of 1965 (which contributed to the enactment of the Voting Rights Act), and the different parts, which the various relevant social actors played at the time.

The first and most direct point, which this chapter attempts to make, is that thinking through the requirements of, what this essay has called, the duty to, at times and provisionally, pause, cool down, and listen, in way which is informed by the three principles of equal access to justice, helped the relevant social actors (the Civil Rights Movement, especially) to design a contentious strategy, which brilliantly integrated political and social activism with judicial engagement in litigation, and made them mutually supportive tools aimed at social change. In particular, thinking through the requirements of the duty in this informed way, helps one to see how Civil-Rights activists were able to steer their political movement, as well as (at least) portions of the public audience, away from anger and retribution as the *sole* rational responses to injustice and unfair injury.

12. FREE LEGAL COUNSEL AND ACCESS TO JUSTICE

1. The Uncertain Paths of Constitutionalization: the Right to Legal Aid in The U.S.; and Europe

This chapter confronts the challenges that courts have traditionally faced in trying to expand the coverage and scope of the right to counsel, as an element of equal access to justice for all (or, at least, its partial aspects which are explicitly recognized in national constitutions). The first part of the chapter provides an account of the different approaches followed by the US Supreme Court (before and after its decision in *Gideon v. Wainwright*¹), and by the European Court of Human Rights² (in interpreting the requirements of art. 6 of the European Convention of Human Rights).

I discuss the approaches followed by the US Supreme Court and the European Court of Human Rights for their political and cultural influence, rather than strictly legal one. Correspondingly, no claim is made that the ‘unequivocal’ and ‘unconditional’ acceptance by either courts of the general approach suggested here (one inspired – that is, by a CA) will necessarily effect a sensible improvement in the level of effective realization of the right of access to justice in the US or in Europe. Rather, I consider the US Supreme Court, and the European Court of Human Rights as exemplary institutions of public reason and, thus, their decisions on access to justice as among the best, and most carefully thought through, expressions of the actual difficulties that public institutions face when they attempt at providing a systematic understanding of the concrete content of the right of to counsel, as an element of equal access to justice as a

¹ 372 U.S. 335 (1963).

² In particular, I will focus on the two famous judgments rendered in *Golder v. UK*, 4451/70, judgment of 21 February 1975; and in *Airey v. Ireland*, 6289/73, judgment of 9 October 1979.

whole. The underlying and operative assumption, consequently, is that a critical appraisal of both their insights as well as their faults might offer valuable contributions to public reason as a whole, both when the latter is directed at changing judicial doctrine, as well as when its point is to inform social and political reasoning more generally.

Finally, I conclude by first sketching alternative institutional models for the delivery of the right to counsel and by proposing a tentative assessment of their potentialities and limitations, leveraging the practical insights of the previous discussion.

2. Legal aid in the US Supreme Court: Gideon and beyond

Perhaps the clearest focal point for reconstructing the right to counsel, as protected by the US Constitution, and interpreted by the US Supreme Court, is the famous Supreme Court's decision in *Gideon v. Wainwright*³. In a nutshell, the Court first construed the Sixth Amendment provision of the right to *retain* counsel for all defendants in criminal proceedings, to mean that in federal courts counsel must be *provided* for defendants *unable* to employ counsel. Thus, it concluded that, contrary to the then twenty-one years old rule articulated in *Betts v. Brady*⁴, the right to a court-appointed counsel should be extended to indigent defendants in *State* courts as well, through the Fourteenth Amendment.

More particularly, in *Betts* the Court argued that the right to appointed counsel for indigent defendants (in non-capital cases) was not of such fundamental importance to justify its extension, through the Fourteenth Amendment, on the conduct of individual States. But in *Gideon* the Court observed that “governments, both state and federal, quite

³ 372 U.S. 335 (1963).

⁴ *Betts v. Brady*, 316 U.S. 455 (1942).

properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries”.⁵ Thus, the Court concluded that “not only [...] precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”⁶: «the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel”.⁷

Since *Gideon*'s decision, the Supreme Court had several opportunities to both expand its initial articulation of the right to legal aid, as well as mark more precisely the point beyond which the US Constitution does not protect indigent parties when the latter try to defend their rights in a court of law. So, for example, in *Gault*⁸, the Court significantly expanded the scope of the rule first articulated in *Gideon* also to *non-*

⁵ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁶ *Id.* at 344.

⁷ *Id.* at 344, 345. This is a direct quotation from *Powell v. Alabama*, 287 U.S. 45 (1932).

⁸ *In re Gault*, 387 U.S. 1, 36–37 (1967).

criminal proceedings, stating that youth in civil juvenile delinquency proceedings⁹ have a due process right to an appointed counsel whenever they risk a potential loss of liberty.¹⁰

On the contrary direction, in *Gagnon*¹¹ the Court found no right to counsel for criminal defendants facing revocation of probation and imprisonment. Moreover, in *Lassiter v. Department of Social Services*¹² the Court found a presumption against a right to counsel for indigent parties in civil proceedings leading to a potential loss of parental rights, arguing that a “pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation”.¹³

However, the Court granted that such presumption could be defeated¹⁴, on a case by case basis, by balancing against it the three factors listed in *Mathews v. Eldrige*¹⁵ and which, since then, govern the allocation of procedural guarantees in non-criminal proceedings. These factors include: first, the nature of the private interest that will be affected; second, the comparative risk of an erroneous deprivation of that interest with and without additional procedural safeguards; and, finally, the nature and magnitude of

⁹See, however, E. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE FORUM FOR LAW AND SOCIAL CHANGE 98 (2011), arguing that “The rationale behind the Court’s holding in *Gault* [...] would apply with equal force to youth in removal proceedings”.

¹⁰ Furthermore, in *Vitek v. Jones*, 45 U.S. 480 (1980), a minority of four judges would have extended the Fourteenth amendment right to counsel to proceedings designed to transfer a prison inmate to a state hospital for the mentally ill.

¹¹ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

¹² 452 U.S. 18 (1981).

¹³ *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981).

¹⁴ *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981).

¹⁵ *Mathews v. Eldrige*, 424 U.S. 319 (1976).

the Government's (or any other) countervailing interest in not providing additional or substitute procedural requirements.¹⁶

Most recently, in *Turner v. Rogers*¹⁷ (which was a civil-contempt case for Turner's willful failure to pay court-ordered child support, ending with Turner's incarceration for one year) the Supreme Court struggled to reach a middle ground between these two opposing tendencies (one pulling for a limitation of possible procedural safeguards in non-criminal cases, and the other one pulling toward an extension of *Gideon*'s legacy in non-criminal proceedings).¹⁸ Michael Turner, the petitioner in the case, had been sent to prison for twelve months for civil contempt for willful failure to pay court-ordered child support over a period of three years. (Even though their consequences may indeed look very similar – namely, losing one's own 'physical liberty' – civil contempt differs from criminal contempt since the former only seeks to coerce the defendant to do what the court has already ordered him to do and, thus, once the defendant complies, he is 'purged' of the contempt and free – for these reasons, the defendant is said to 'carry the keys of his prison in his own pocket').¹⁹

Turner argued that his procedural due process rights had been violated since he lacked legal representation at his contempt hearing, being unable to afford it. The Court, however, on one hand reaffirmed *Lassiter*'s 'pre-eminent generalization' that no 'categorical' right to counsel could be attributed to non-criminal defendants²⁰, and found that the application of the *Mathews* test could *not* overcome the presumption against the right to counsel in civil proceedings in the specific case at hand: Turner, though risking a

¹⁶ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁷ *Turner v. Rogers*, 131 U.S. 2507 (2011).

¹⁸ *Ibid.* at 2514.

¹⁹ *Ibid.* at 2515.

²⁰ *Ibid.*

potential loss of liberty (which, in fact, he suffered), was not entitled to a lawyer paid by the State.²¹ But, on the other hand, the Court vacated the South Carolina Supreme Court's judgment, and found that the trial court *did not* employ adequate procedural safeguards which, even though less expensive than the provision of counsel, would have guaranteed Turner's effective opportunities to identify the most crucial issues in his case and, eventually, adduce evidence concerning such issues.²² More specifically, the Court found that such 'alternative procedural safeguards' should have included: notice to the defendant that his 'ability to pay' is a critical issue in contempt proceedings; the use of a form to elicit relevant financial information; an opportunity at the hearing to respond to statements and questions about his financial status; and an express finding by the court that the defendant has the ability to pay.²³

3. From retaining one's lawyer to access to justice: from formal opportunities to capabilities

The US Supreme Court's approach with respect to the allocation of the right to counsel (as reconstructed thus far) uses three different arguments. First, there is an argument based on a textual reading of the Constitution and, more specifically, on the Sixth Amendment provision regarding the right to retain counsel in criminal proceedings.²⁴ A second argument assigns specific priority to one's interests in her own 'physical liberty', over and against any other of one's freedoms and capabilities.²⁵ Finally, a third

²¹ *Ibid.* at 2520.

²² *Ibid.* at 2523.

²³ *Ibid.* at 2521.

²⁴ See, especially, *Ibid.* at 2515 and at 2524 - 2526 (Thomas J., dissenting)

²⁵ See, for example, *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) at 27, 28.

argument²⁶ laments the need for tragic decisions in the allocation of legal services to those who are unable to afford them, especially in a world of scarce resources.²⁷

According to the analysis proposed here, such approach runs into difficulties on two general grounds: first, *if* the Supreme Court is right in recognizing a constitutional commitment to financing legal aid for the indigent criminal defendant (as I believe it is), then it has offered very few plausible reasons for not extending such commitment to a broader group of indigent parties. Second, the *Mathews-Eldridge* test²⁸, which governs (since *Lassiter v. Department of Social Services*²⁹) the way in which judges are supposed to allocate procedural due process rights (including the right to legal aid) in non-criminal settings, fails to capture much of what is normatively relevant and tends to produce unreasonable results.

Judge Thomas, writing for the minority in *Turner* (in a dissent joined by Scalia, Roberts and Alito), argued that “under an original understanding of the Constitution, there is no basis for concluding that the guarantee of due process secures a right to appointed counsel in civil contempt proceedings”³⁰: “such a reading would render the

²⁶ Barton, B., Bibas, S., *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012) argue that in *Turner* the Court got it right (not unduly expanding the right to counsel in civil cases, but struggling to find other, less expensive, viable, solutions).

²⁷ Note that the three arguments operate at rather different levels of analysis and yet, neither of them is *individually* sufficient to justify the rather harsh choices made by the Supreme Court after *Gideon*: it is quite possible, and reasonable, to prioritize ‘physical liberties’ over and against other freedoms but that alone would not justify the distinction between civil contempt cases and criminal proceedings *with regards to the right to counsel* without the textual support of the Sixth Amendment. Similarly, it is hard to deny that we live in a world with scarce resources but that alone would not justify the Court’s decision to make, say, parents seeking to retain their parental rights pay such price, without an argument that could explain *why* the ‘physical’ liberties of one person are more important than *her own* parental rights. Finally, a mere textual reading of the 6th Amendment, without an argument for the importance of one’s ‘physical’ liberties and a strategy for understanding what procedural rights can do to protect them, would not even justify the right to counsel in criminal proceedings.

²⁸ *Mathews v. Eldridge*, 424 U.S. 319 (1976), at 335.

²⁹ 452 U.S. 18 (1981).

³⁰ *Turner v. Rogers*, 131 U.S. 2507 (2011), at 2524.

Sixth Amendment right to counsel—as it is currently understood—superfluous”.³¹ The Sixth Amendment is the only constitutional provision that mentions any right to counsel, and “the fact that a constitutional provision expressly provides a right to counsel in specific circumstances indicates that the Constitution does not also *sub silentio* provide that right far more broadly in another, more general, provision”³²: “ordinarily we do not read a general provision to render a specific one superfluous”.

And yet, if we look at the actual practices, *mores*, and interpretations followed by courts (both state as well as federal), the fact that the Supreme Court, in *Gideon*, needed something more than a mere textual reading of the 6th Amendment, in order to extend the right to counsel to parties in state criminal proceedings, becomes rather apparent. For one thing, it is not at all clear that counsel originally referred to ‘licensed attorney’³³. And, certainly, the 6th Amendment did *not* require the appointment of counsel to indigent parties *before* *Gideon*, even in federal criminal proceedings. The general practice for all the 19th Century was, instead, to require the appointment of counsel for the indigent only in cases of treason or other capital crimes.³⁴ Finally, consider: up until at least the beginning of the 20th Century the vast majority of cases filed in Courts (both state and federal) were criminal ones. Since then, non-criminal filings have taken up and, then, largely surpassed criminal ones.³⁵ Why can we not say, then, that the expression ‘right to counsel in criminal proceedings’ originally referred to ‘right to counsel in whatever area of law people most frequently end up in courts for’?

³¹ *Ibid.*

³² *Ibid.*

³³ See DEBORAH RHODE, ACCESS TO JUSTICE (2004), at 51.

³⁴ See *Ibid.* (quoting 19th Century Federal Statutes, regulating the right to retain counsel).

³⁵ J. Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

No simple reconstruction of the practices and *mores* concerning a right to counsel can provide a univocal justification of the current allocation of the right to counsel, nor would such reconstruction allow the recognition of a *categorical* right to counsel for the indigent defendant even in criminal proceedings. Rather, the Court in *Gideon* needed to articulate an interpretation of what we would now call a right to ‘meaningful access to justice’ that could, first, provide an interpretation of procedural rights and guarantees as *real* opportunities for action and participation in legal proceedings, rather than mere *formal* rights and constraints to State action (and, thus, capture the difference between a mere right to *retain* one’s own counsel and an effective right to counsel, no matter one’s ability to pay for it).³⁶ Second, the Court had to show the arbitrariness of the distinction between capital and non-capital cases, with respect to such interpretation of procedural rights³⁷; and, third, overturn the so-called ‘special circumstances’ rule, which dominated courts’ decisions regarding the right to counsel before *Gideon* and that conditioned the recognition of the right to the existence of such ‘special circumstances’³⁸. Interestingly, the latter were typically thought to include “the ignorance, the illiteracy, their youth [...], the circumstances of public hostility”³⁹, or, more simply, the complexity of the legal questions presented⁴⁰ – in sum, exactly the kind of circumstances that could make the formal attribution of rights (like the right to *retain* one’s own counsel) of ‘little avail’, depriving one of *real* opportunities to enjoy them.

³⁶ See the language used in *Gideon v. Wainwright*, 372 U.S. 335 (1963), especially at 345, 346.

³⁷ See *Gideon v. Wainwright*, 372 U.S. 335, 338, 339, 340 (1963) and *Betts v. Brady*, 316 U.S. 455 (1942).

³⁸ For a discussion of the ‘special circumstances rule’, see *Gideon v. Wainwright*, 372 U.S. 335, 350, 351 (1963).

³⁹ See *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

⁴⁰ *Gideon v. Wainwright*, 372 U.S. 351 (1963).

The contrast between the interpretation of procedural rights as mere formal constraints for the behavior of authorities or as real and effective opportunities for action and participation in legal proceedings was clearly not an invention of *Gideon*'s majority, however. For example, it was anticipated by Judge Sutherland in *Powell v. Alabama*⁴¹ (a decision which, in turn, was heavily quoted by the *Gideon*'s Court), when, wrestling with the then dominant interpretation of the 6th Amendment as attributing to the criminal defendant a mere right to retain counsel, he argued that "even if opportunity had been given to employ counsel⁴² [...], we are of opinion that, under the circumstances just stated [the ignorance, the illiteracy, their youth [...], the circumstances of public hostility], the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process".⁴³ Interestingly, a few paragraphs above the quoted sentence, Sutherland seems to be willing to extend the recognition of a right to counsel even further, breaking the strong connection (quite clear in the quoted passage) between such recognition and the existence of 'special circumstances'⁴⁴ – as, for example, the 'ignorance, illiteracy, the youth' of the defendants, and where the latter are a necessary condition for the former –

⁴¹ 287 U.S. 45, 71 (1932).

⁴² Judge Sutherland here is referring to the fact that the trial court even failed to give the defendants reasonable time to secure the appointment of a counsel (287 U.S. 45, 71 (1932)). For an extended discussion (of the broader fact-pattern in *Powell* itself) see also WILLIAM BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURT* (1955).

⁴³ 287 U.S. 45, 71 (1932).

⁴⁴ In fact, it is precisely by commenting on these remarks (concerning *both* an interpretation of the kind of the *goal* that we should have in mind when articulating due process requirements, *as well as* a plausible understanding of the actual abilities of the parties of legal proceedings) in 1955 (and so over eight years before *Gideon* was decided), that William Beaney concluded that "Judge Sutherland was urging the expansion of the right to counsel, previously defined as the limited right to retain one own's counsel [...]: This principle [...] could be broadened by generous judges into a sweeping rule that counsel must be appointed in virtually all criminal cases if indigents are to have a fair hearing"; see BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURT* (1955), at 155. One problem with the 'special circumstances' rule is well captured by a quote attributed to an appellate lawyer and reported by Deborah Rhode (see RHODE, *ACCESS TO JUSTICE* (2004), at 57): "How can a judge, when a man is arraigned, look at him and say there are special circumstances: Does the judge say, 'You look stupid?'".

when he notes that: “Even the intelligent and educated layman has small and sometimes no skill in the science of law...He requires the guiding hand of counsel at every step in the proceedings against him”.⁴⁵

Such contrast between competing interpretations of procedural due process requirements in legal proceedings reappears in two more recent Supreme Court’s decision: *Bounds v. Smith*⁴⁶ on one hand, and *Lewis v. Casey*⁴⁷ on the other. In *Bounds*, the issue was whether States must protect prisoners’ right to access to the courts by providing them with law libraries or alternative sources of legal knowledge. Judge Marshall, writing for the majority, stated that “it is now established beyond doubt that prisoners have a constitutional right of access to the courts”⁴⁸, imposing an affirmative duty to the States to ensure that access to the courts is in fact ‘adequate, effective and meaningful’⁴⁹. Marshall found that the Court has to determine which means “are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts”⁵⁰, and, while allowing (and even encouraging) local experimentation, Marshall clearly articulated the constitutional standards governing State actions in terms of positive duties of assistance, nurturing the prisoners’ actual possibilities of protecting their rights.⁵¹

The Court’s decision in *Lewis v. Casis* originated from a class action filed on behalf of all male prisoners incarcerated by the State of Arizona Department of

⁴⁵ *Powell v. Alabama*, 287 U.S. 45, 68, 69 (1932).

⁴⁶ *Bounds v. Smith*, 430 U.S. 817 (1977).

⁴⁷ *Lewis v. Casey*, 518 U.S. 343, 346 (1996).

⁴⁸ *Bounds v. Smith*, 430 U.S. 817, 821 (1977).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

Corrections⁵², alleging a violation of their right of access to the courts. The District Court, quoting *Bounds*, found that the Arizona Department of Correction system did not comply with constitutional standards, in matters ranging from the «training of the library staff, to the updating of legal materials, to the availability of photocopying services»⁵³, because all such shortcomings of the Correction system failed to protect the prisoners' constitutional right to 'an effective, adequate and meaningful' access to the courts. The Supreme Court reversed the judgment of the Court of Appeals for the Ninth circuit (which affirmed the District Court's initial finding). Judge Scalia, writing for the majority, found that in *Bound* the Court went beyond the articulation of the right of access to justice as it was originally recognized in the earlier cases on which it relied. In particular, Scalia contested *Bound*'s implicit understanding of the right of access to justice as imposing a duty on the States to "enable the parties to discover grievances and litigate effectively once in Court".⁵⁴ Instead, Scalia concluded that the right of access to the courts, as recognized by the Constitution, should not be given a broader definition than one requiring, at best, a mere 'ability to present grievances to the Courts', or, even more narrowly, prohibiting State's officials to actively *interfere* with inmates' attempts to prepare legal documents: in any case, "a more limited capability, that can be produced by a much more limited degree of legal assistance".⁵⁵

⁵² Lewis v. Casey, 518 U.S. 343 (1996).

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

4. The dubious grounds of a utilitarian calculus in allocating access to justice

In *Lassiter*, the US Supreme Court established a weighty presumption against the appointment of counsel in non-criminal proceedings, and directed courts to weight, in order to overcome such presumption, the following considerations: 1) the nature of the private interest that will be affected; 2) the comparative risk of an erroneous deprivation of that interest with and without additional procedural safeguards; 3) the nature and magnitude of the Government's countervailing interest in not providing additional or substitute procedural requirements.⁵⁶

The Court's central holding has not remained immune from harsh criticism, however, on several counts.⁵⁷ For one thing, and quite apart from the actual persuasiveness of the Court's approach itself, there is much reason to doubt that lower courts have actually followed the Supreme Court's main holding very closely.⁵⁸ In fact, the application of the *Mathews*' test to the *Lassiter*'s fact pattern itself could have easily

⁵⁶ *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981).

⁵⁷ See, for example, J. Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011); C. Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006); L. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. R. L. REV. 527 (2006); Symposium, *A Right to a Lawyer? Momentum Grows*, CLEARINGHOUSE REV. 163 (2006). See also J. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 1981, in *Faculty Scholarship Series*. Paper 1152, http://digitalcommons.law.yale.edu/fss_papers/1152.

⁵⁸ The due process standards enforced in removal proceedings for minors in immigration courts offer another rather striking example of such divergence between the rule explicitly announced, and the rule which is actually *followed* in allocating the right to counsel in the non-criminal domain (however that is defined, in turn). Under current immigration law, minors facing deportation are not entitled to a right to counsel for the proceedings adjudicating the legality of their immigration status and are thus expected to 'navigate' the immigration system by themselves. But, as Elizabeth Frankel has persuasively shown, carefully weighting the competing interests identified in *Mathews*, the child's interests (potential loss of liberty, disruption of family ties, removal from the country) are particularly weighty in removal proceedings; the risks of an erroneous deprivation of such interests without the appointment of counsel are substantial; and the weight of the Government's countervailing interest in not providing counsel to minors facing removal is at least dubious. See E. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE FORUM FOR LAW AND SOCIAL CHANGE 98 (2011). Moreover, according to W. Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L. J. 195 (1996), in some jurisdictions family courts do not even hold *Lassiter*'s hearings.

allowed an exactly opposite decision, granting the recognition of a right to counsel in proceedings, potentially leading to the termination of parental rights.⁵⁹

One possible reason for this relates directly to the substantial difficulty in actually *doing* the calculation proposed by the Supreme Court. This should not come as a surprise: the theme of access to justice inevitably calls for complex evaluative enterprises, moving beyond traditional legal analysis of textual materials and black-letter law to largely uncharted new territories of empirical investigation of larger social dynamics and phenomena. Within these broader tasks and complex challenges for normative evaluations, as Judith Resnik summed it all up, “while one can state the equation [referring here to the *Mathews*’ test], one cannot do the math because data are missing”⁶⁰, concluding that “its [the *Mathews*’ test’s] veneer of scientific constraints on judicial judgment can serve to mask the lack of genuine empiricism”.⁶¹

Even short of conclusive answers provided by adequate studies on the likely impact of different procedural arrangements (like the right to counsel for indigent parties) on the actual capabilities of actual or potential litigants, we may still wonder whether the questions that the *Lassiter*’s Court is posing are indeed adequate to the task of pointing

⁵⁹ See, for example, Judge Blackmun’s dissent in *Lassiter* (452 U.S. 18, 36 (1981)), methodically applying the *Mathews*’ test to the facts at issue. For a detailed analysis of the reasoning of Judge Powell (who concurred and joined J. Stewart’s opinion for the majority) and Judge Blackmun (who filed a dissent, joined by Judges Marshall and Brennan with Judge Stevens filing a separate dissent), using their personal notes and papers, see R. Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057 (2010). Hornstein’s argument is that the key issue in the case turned out to be, quite simply, Mrs *Lassiter*’s poverty and the fact that the five Justices of the majority identified her, perhaps not entirely unreasonably, as an ‘underserving poor’ – but, of course, it is not at all clear how *that* should settle the question of whether she had a right to counsel or not. On these matters, see also Elizabeth Thornburg’s breathtaking chapter on *Lassiter* in K. CLERMONT, *PROCEDURAL STORIES* (2008), at 509, with extracts from *Lassiter*’s hearing itself.

⁶⁰ J. Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011), at 158.

⁶¹ *Ibid.*

the interpreter's attention to justifiable goals and to a perspicuous understanding of what it means to have effective access to justice.

First of all, note the ambiguity with which the Court defines the competing interests that need to be balanced. For example, the Court seems to interpret both the private interests of the parties, as well as the countervailing Government's interest rather narrowly – that is, as having to do only with the interests that are litigated in the specific proceeding under scrutiny. This would inevitably exclude all the other interests which, depending on the broader context of the litigation itself, or of the particular lives of the parties involved, could be effected and with respect to which the protection of the interests actually in dispute serves only instrumentally. Within this much broader evaluative framework, the recognition of a right to counsel for indigent parties in one particular area of the law could be justified in light of its instrumental value in protecting such parties' interests in *other* domains and contexts.

Second, and relatedly, the Court does not seem to pay much attention to the obvious differences, in the evaluation of one's interest in a legal proceeding, among different kinds of litigants and parties. For example, one's interests in not losing her home, or her employment, may vary quite sensibly depending on whether one can readily substitute such goods and opportunities through the market or through some other mechanism. Perhaps, such neglect is not entirely unreasonable within *Lassiter's* fact pattern itself, since the interests at issue there were a mother's parental rights. And yet, it is not at all hard to imagine actual situations (like the ones mentioned above), in which paying closer attention to the significance of the particular litigation at hand within the

larger context of the litigants actual freedoms and opportunities, could sensibly alter one's interpretation of the *nature* and *magnitude* of the interests at stake.

Finally, consider the second criterion listed in the *Mathews*' test, which requires courts to evaluate the 'comparative *risk* of an erroneous deprivation' of the party's personal interest with or without additional procedural safeguards.

Note that a mere comparative risk assessment of different procedural arrangements would deliberately exclude the possible expressive significance of enabling parties to effectively litigate their rights, by enforcing norms of equal standing within a free and unrestricted public articulation of one's reasons. More generally, the need to pay close attention to the actual capabilities of the parties, and *compare* them in order to determine the proper level of procedural safeguards could be even justified on purely consequentialist grounds. In fact, some language both in *Lassiter*'s dissent, as well as in *Turner*'s majority opinion, would seem to suggest that the recognition of a right to counsel in non-criminal proceedings could be triggered by the simple fact that the *other* party is represented by counsel, since in this latter scenario the risk of an erroneous result would inevitably increase.

Furthermore, consider the difficulties in grounding the risk assessment required by the *Mathews*' test on an *ex-post* evaluation of the likely effects of using more expensive procedural safeguards (like the right to counsel) on the decision at hand⁶²: the majority in *Lassiter* seems satisfied to announce that even if counsel were used in the case at hand, it could still *not* be shown that the decision could have plausibly come out differently. Note, however, how, paradoxically, this line of argument could even justify flipping a coin, instead of ascertaining the facts of the case. Suppose that, *with some luck*,

⁶² See *Lassiter v. Department of Social Services*, 452 U.S. 18, 51, 52 (1981).

had the North Carolina state court flipped a coin to decide whether to terminate Ms. Lassiter's parental rights, it would have still reached the same decision as it actually did (thus terminating Ms. Lassiter's parental rights). Clearly, *in this latter scenario*, it would obviously be of no relief (for any other party in North Carolina state courts), knowing that the use of a more sensible procedure (say, looking closely at the actual merits of the case, instead of flipping a coin) would have led to the same result (the termination of Ms. Lassiter's parental rights).

5. The protection of civil legal aid in the European Convention of Human Rights

Golder v. United Kingdom (1975), and *Airey v. Ireland* (1979) are both two well-known decisions by the European Court of Human Rights. Notwithstanding their notoriety, a detailed analysis of the two decisions might prove illuminating and useful. For one thing, the textual material used by the European Courts of Human Rights (ECHR) to reach the first recognition of the right of access to justice (that is, art. 6, par. 1 of the Convention) is, all in all, very similar to the standard, 'open courts', 'fair and public hearing', 'right to be heard' clauses, which are found in so many traditions of constitutional texts (including the US Federal Constitution).⁶³ Moreover, art. 6 of the Convention, like the US Constitution, explicitly recognize a right to legal aid *only* to criminal defendants.⁶⁴ Also, the contrast between the two opposing interpretations of procedural rights (as mere

⁶³ More specifically, art. 6 par. 1 of the European Convention on Human Rights recites as follows: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...].

⁶⁴ Art. 6 par. 3:

Everyone charged with a criminal offence has the following minimum rights:

[...]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

[...].

formal restraints on state action, or as real opportunities for action and participation) that, I have shown, cuts across many decisions of the US Supreme Court, reappears rather clearly in the two ECHR's decisions. In the latter, however, the Court has explicitly rejected what I found to be the least promising one proposed by the US Supreme Court (and that would tend to curtail rather harshly the procedural safeguards of indigent parties) and endorsed unequivocally the other. Finally, the language used in the two decisions has proved remarkably influential, even outside the narrower domain of the right of procedural rights and guarantees, signaling once more the perspicacity of the interest in access to justice, for developing broad strategies of social reform.

On the evening of the 24th October 1969, a riot broke out in Parkhurst Prison, United Kingdom. Laird, a prison officer, was injured in an attempt at quelling such 'disturbance'. In a first statement describing the events, the officer identified Elmer Golder, who was serving a fifteen years term for robbery with violence, as being among those that "were swinging vicious blows at me".⁶⁵ Notwithstanding the fact that Laird later qualified his initial identification, stating that he was not "certain that [Golder] made an attack on [him]"⁶⁶, and that another prison officer offered testimony as to the fact that "Golder was in this room with me and to the best of my knowledge did not take part in the riot",⁶⁷ Laird's first accusations were kept as entries in Golder's prison record until 1971, and then removed only during the examination of the case by the European Commission of Human Rights.

⁶⁵ *Golder v. UK*, 4451/70, judgment of 21 February 1975, p. 4.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

On 20th March 1970, suspecting that “it is this [Laird’s accusations] that has prevented [Golder] from being recommended by the parole board for parole”⁶⁸, Golder addressed a petition to the Secretary State for the Home Department, asking for permission to consult a solicitor “with a view to taking civil action for libel”.⁶⁹ On 6th April 1970, the Home Secretary, in application of the Prison Act 1952, rejected the application.

Then, in March 1971, Golder submitted two complaints to the European Commission on Human Rights, challenging the Home Secretary’s refusal. In one of these, in particular, Golder argued that the Home Secretary’s refusal to permit him to consult a solicitor, constituted a violation of his right of access to justice, granted by art. 6, par. 1 of European Convention on Human Rights.⁷⁰

Against Golder’s petition, the UK Government argued that art. 6 does not recognize a right of access to justice, but, rather, confers to the parties already involved in legal proceedings a right to a fair trial and hearing⁷¹ – thus, the Government concluded, the rights recognized by article 6 do *not* extend their protections to the actual opportunities that one has in *instituting* a particular legal procedure, but only confer procedural safeguards *once* such proceedings have been already instituted.

In any case, the Government added, even “if the Court finds that the rights conferred by Article 6 (art. 6) include in general a right of access to courts, then the United Kingdom Government submit that the right of access to the courts is not unlimited

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

in the case of persons under detention”.⁷² Thus, the Government concluded that the imposition of a reasonable restraint on access to the courts might be permissible in the interest of prison order and discipline and that, in this case, “the refusal of the United Kingdom Government to allow the applicant to consult a lawyer was within the degree of restraint permitted”.⁷³

In response to the UK Government’s petition, the Court relied on four different arguments. First, the Court argued that even though the United Kingdom did not formally deny Golder of his right to institute proceedings before a court and, in any case, it did so *de facto* only temporarily (since, as the Government argued, on obtaining his release, Golder would have been in a position to have recourse to the courts at will), the Home Secretary did in fact prevent him to commencing an action. And, the Court concluded, “hindrance in fact can contravene the Convention just like a legal impediment”: “hindering the effective exercise of a right may amount to a breach of that right, even if the hindrance is of a temporary character”.⁷⁴

Second, the Court relied on a close textual reading of art. 6, especially in its French version⁷⁵, to conclude that the ‘right to be heard’ (in the French version: “*droit à ce que sa cause soit entendue*”; which in English becomes “right to a [fair] and [public] hearing”) therein recognized, should not be interpreted as being only limited to procedural safeguards recognized to the parties of proceedings which have been *already* instituted (that is, as rights pertaining merely to the ‘hearing’). Rather, the Court recognized that such clause explicitly extends its protection to the very *institution* of legal

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.* at 9.

⁷⁵ *Ibid.* at 10.

proceedings (thus, as the French version makes clearer, as the right that one's 'cause' is heard).

Third, the Court relied on the preamble of the European Convention, and, in particular, on the latter's reference to the 'Rule of Law', as a common heritage of European countries that are members of the Council of Europe, concluding that "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts"⁷⁶, and, even more emphatically, "It would be inconceivable, in the opinion of the Court, that Article 6 par. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings".⁷⁷

Finally, the Court, having firmly established a first articulation of the right of access to justice as an essential and integral component of the right to a fair trial and public hearing recognized by art. 6, confronted the further problem of justifying a reasonable rationale for establishing limitations to its concrete enforcement. Unfortunately, the Court fell short of elaborating, in her words, "a general theory of the limitations admissible in the case of convicted prisoners", or in the case of other potential parties to legal proceedings.

And yet, a number of points made by the Court while arguing that the limitations imposed by the Home Secretary to Golder's right of access to justice, constitute a violation of art. 6, deserve at least to be mentioned. First, the Court noted that the point of

⁷⁶ *Ibid.* at 13.

⁷⁷ *Ibid.*

Golder's request to consult a lawyer was to try to exculpate himself, by suing Laird (the prison officer who accused him of taking part in the riot) for libel. Second, and relatedly, the Court stressed that the contemplated legal proceedings would have dealt with incidents connected with 'prison life', likely affecting Golder's conditions of imprisonment. Third, the Court noted that "those proceedings would have been directed against a member of the prison staff who had made the charge in the course of his duties and who was subject to the Home Secretary's authority".⁷⁸ Finally, the Court, in recognizing that the right of access to justice should not be seen as an 'absolute right' (which means, in the Court's terminology, that the right itself could admit some limitations), proposes a striking analogy with the right to education. In particular, the Court notes that, like the right to education, the right of access to justice too, by its very nature, calls for regulation by the State, adding that such regulation "may vary in time and place according to the needs and resources of the community and of individuals"⁷⁹, but should never "injure the substance"⁸⁰ of the right.

In *Airey v. Ireland*⁸¹, the Court further articulated the right of access to justice in a significant way, clarifying (in contrast with, as we shall see, some language in Golder, arising from the particular fact-pattern in that case) that the very content of such right, as recognized by the European Convention, includes positive obligations to assure that the rights guaranteed by the Convention are not 'theoretical and illusory', but 'practical and effective'.⁸²

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Airey v. Ireland*, 6289/73, judgment of 9 October 1979.

⁸² *Ibid.* at 9.

Mrs. Airey was an Irish citizen, married with four children. Since June 1972, Mrs. Airey tried to obtain a decree of judicial separation, grounded on her husband's alleged physical and mental cruelty to her and her children (in fact, Mr. Airey was eventually convicted for assaulting her and fined. Also, he persistently refused to conclude a separation agreement), but "in the absence of legal aid and not being in a financial position to meet herself the costs involved"⁸³, she was unable to secure the services of a lawyer. (The readers may recall that in 1972 divorce did not exist in Ireland).

Thus, Mrs. Airey addressed the Commission, alleging, among other issues that, because of the prohibitive costs of the proceedings, she could not obtain a judicial separation and, thus, that her right of access to justice, as articulated in *Golder* and recognized in art. 6.1 of the Convention, had been violated.

In order to contest Mrs. Airey's allegations, the Irish Government adduced several arguments, four of which deserve close scrutiny, since the Court's replies, in turns, might help us to highlight a number of key features of the Court's overall approach.

The Government argued, first, that Mrs. Airey did, in fact, enjoy access to the courts, since "she was free to go before the court without the assistance of a lawyer".⁸⁴

Second, the Government tried to distinguish the *Golder* case, arguing that, there, the applicant (Mr. Golder) had been effectively prevented from having access to the court. Here, instead, Mrs. Airey faced no obstacle posed by the State, but, rather, asked herself for a positive intervention by the Irish Government.

Third, the Government noted how recognizing a right to legal aid to Mrs. Airey, would inevitably force the Court to recognize a similar protection in *all* cases concerning

⁸³ *Ibid.* at 3.

⁸⁴ *Ibid* at 9.

the determination of a civil right, thus rendering the provision contained in article 6.3, that recognizes a right to legal aid only in criminal cases, entirely superfluous (this is what Judge Thomas, of the US Supreme Court, feared with respect to the 6th Amendment of the US Constitution).

Finally, the Government lamented that art. 6 of the European Convention should not be interpreted “so as to achieve social and economic developments in a Contracting State; such developments can only be progressive”.⁸⁵

In contrast with these arguments, the Court observed that the Convention is not intended to guarantee rights that are «theoretical and illusory», but «practical and effective». Thus, the Court identified the central issue in the *Airey* case as consisting on whether Mrs. Airey appearance before the court *without* being assisted by a lawyer could ever be effective, “in the sense of whether she would be able to present her case properly and satisfactorily”.⁸⁶ In particular, the Court argued that proceedings in the Irish High Court (the forum where Mrs. Airey could have had a decree of judicial separation) are distinctively complex. Furthermore, the Court added that «litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court”.⁸⁷

Having thus clarified the formulation of the right of access to justice contained in *Golder* as possibly requiring a *positive* action on the part of the State, to “safeguard the

⁸⁵ *Ibid.* at 11.

⁸⁶ *Ibid.* at 10.

⁸⁷ *Ibid.* at 10.

individual in a real and effective way”⁸⁸, the Court went on and argued that “the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention”.⁸⁹

Finally, the Court excluded that its conclusion in *Airey* could be generalized in all civil cases and for all parties involved therein, and recognized (in a language quite similar to the one used in *Turner* by the US Supreme Court), that the institution of legal aid constitutes *one* of the means by which a State may guarantee effective access to justice, as required by art. 6 of the Convention; but, also, that there are possibly *other* means available, such as, for example, a simplification of procedure.⁹⁰

In sum, the ECHR seems to have taken a much more pro-active approach to the right of access to justice, than the one followed by the US Supreme Court, explicitly recognizing, for example, a possibly very broad duty to positive actions by States, like the recognition of publicly-financed system of legal aid, directed at safeguarding individual parties in a real and effective way, even in civil cases.

But the Court did not go very far in the concrete specification of the content of such positive duties. The Court does not articulate, on one hand, the precise obstacles that, hindering one’s effective access to the courts, would trigger the State’s positive duty of assistance to indigent parties and, on the other, the competing limitations to the right itself and whose existence would, correspondingly, discharge such duties.

⁸⁸ *Ibid.* at 12.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

6. Fertile Functionings and Corrosive Disadvantages in Access to justice

Once governments recognize a general commitment to financing legal aid for at least a portion of indigent parties (like the indigent criminal defendant), a number of difficult and urgent questions begin to call for attention. In particular, it is important to know how to *prioritize* which and whose claims. And, correspondingly, which and whose claims do not deserve special attention.

Thus, one challenge for any approach to access to justice is to produce a systematic assessment of the impact of different institutional designs on the lives of *each and everyone* of the individual users of law, while, at the same time, identifying when tragic choices are really called for and proposing strategies for their temporary solution and long term eradication.

Two ideas recently introduced within a CA (the idea of corrosive disadvantage and the related idea of fertile functioning)⁹¹ may help to do just that – that is, assigning special priority to specific legal claims.

In their work on *Disadvantage*, Wolff and de-Shalit's central goal is to provide and philosophically justify a method, which is able to identify the least advantaged group in any given society, and propose reasonable policy initiatives to improve their 'lot'.⁹² Crucially, Wolff and de-Shalit's first step is to provide a list of central human functionings (they find six: life, bodily health, bodily integrity, control over one's environment, affiliation and sense, imagination and thought), on whose central

⁹¹ See J. WOLFF, J., A. DE-SHALIT, *DISADVANTAGE* (2007), at 121 – 126, 133, 134.

⁹² *Ibid.*

importance for ‘a life going well’, they argue, a (qualified⁹³) reasonable consensus could be reached among different people and social groups.

Having set the stage this way, Wolff and de-Shalit introduce a number of different ‘observation-concepts’, that could ‘guide’ empirical research, which looks at performance on the six categories of functionings among different individuals and social groups.

The simplest of such ‘observation-concepts’ is what they call ‘clustering’⁹⁴ or ‘dynamic clustering’, which consist in an observation of possible correlations between different disadvantages. Such observation can be made looking at ‘snapshot’ figures of different disadvantages, tracking the extent to which they actually cluster for different groups of individuals, or, more interestingly, looking, in longer time-intervals, at the progressive deterioration of different functionings (hence the idea of ‘dynamic clustering’).

The distinction between corrosive disadvantage⁹⁵ and fertile functioning⁹⁶ builds upon the observation of cluster of disadvantages, looking for possible causal connections (which are left unobserved by mere statistical observations of ‘clusters’) between capabilities failures in one domain and capabilities failures in another; or, conversely, searching for the possible ‘spill overs’ of enhancing one’s capabilities in one domain, in other domains as well. At times, a disadvantage in one area (say, just to stick with one of Wolff and de-Shalit’s examples, parental abuse or neglect in childhood) is causally

⁹³ By ‘qualified’ I simply mean that it is indeed *not* necessary for Wolff and de-Shalit’s approach to get off the ground that everyone agrees that there are *no* other important categories (on the contrary, it would be safe to assume that there *are* indeed other important categories, beyond the ones that they list), but merely that *at least* these six would consistently appear in one’s informed judgment on how her own life is going. See *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

responsible for disadvantages in another way, at a different time (say, drug-addiction). Conversely, at times one advantage in one area (say, having a sense of humor), is causally responsible to advantages in another area (meeting new friends in a new environment). In sum, the two notions jointly aim at finding ‘causal pathways’ between disadvantages in different areas.

Now, note that the two notions, even though obviously related, are not one and the same (with one being the mere converse of the other) – that is, identifying a *corrosive* disadvantage, even though possibly quite instructive, may very well *not* tell us everything we want to know about possible *fertile* functionings. As Wolff and de-Shalit emphasize, “‘causation in’ is not always the same as ‘causation out’”.

Take, for example, the possible (and indeed, highly probable) relation between low-income and frequency of unmet legal needs. The former disadvantage, especially in a legal system without legal aid, or with costly access fees (and no system of waiver for indigent parties) can, indeed, be quite corrosive. And yet, the corresponding functioning (that is, having enough income to be able to pay for a lawyer, or short of that, living in a country that does protect at least a portion of indigent parties by providing free legal aid) may not be, when taken in isolation, particularly *fertile*: one may still be not aware of her legal rights, or too scared and humiliated to even aspire to vindicate them, or, even if well aware and not scared, rather hopeless that hiring a lawyer would do much to solve her problems.

So, what would be the advantage, for constitutional courts, or courts more generally, to reflect on the two ideas of corrosive disadvantage and fertile functionings when articulating the content of the right to legal counsel?

First and most directly, interest in ‘corrosive disadvantages’ and ‘fertile functionings’ forces the interpreter to move away from an exclusive focus on disposable income, in the determination of appropriate cut-off lines, which should justify direct public intervention on people’s combined capability to make claims or resist to ones made by others. As we have seen throughout the whole essay, use of legal services and activation of formal proceedings rely upon different kinds of resources, and expose one to different kinds of costs and risks, beyond exclusively monetary ones. If we take as the appropriate target of public intervention the identification of fertile functionings and corrosive disadvantages, then practical analysis must concentrate on the impact of the expected costs of legal proceedings on a whole range of capabilities and functionings, as well as on the latter’s role in securing the combined capability to make claims or resist to ones made by others. Correspondingly, practical action by public authorities should rely on assessments of these links (between the expected costs of legal proceedings, the being’s more general capabilities and functionings, and the combined capability to make claims or resist to ones made by others), within the lives of differently situated claim-makers.

Second, attending to such two ideas makes the interpretation of procedural due process requirements as real opportunities for action and participation inevitably explicit. It would make little sense to ponder on, say, the fertility of recognizing a particular procedural right, without asking, also, whether the corresponding *capability* has been guaranteed as well, beyond the mere formal recognition of the right itself.

Third, and relatedly, the two ideas immediately direct the interpreter to consider the value of any of such real opportunities for action (like the right of counsel), or a

combined set of them (like the recognition of a right to counsel, together with a simplification of procedural devices, or, even more broadly, the recognition of new substantive claims) within the broader context of the lives of either actual or potential parties. Recall that this is one of the weaknesses that I have detected within the approach of the US Supreme Court and, even if perhaps a bit mitigated, also within the approach of the ECHR. Conversely, the focus on the possible fertility of one or a group of functionings or capabilities within the legal process immediately calls for a broader evaluation of the possible impact of different procedural arrangements on a set of fundamental substantive functionings and capabilities.

In fact, the need to re-direct both scholarly and political attention from the narrow focus on individual claims and legal needs, to a more comprehensive view of people's encounters with the legal system, corresponds to one traditional criticism of the current delivery of legal services, and, in particular, of the use of individualized legal aid to overcome market-based inequities.⁹⁷ If unmet legal needs tend in fact to cluster across different legal domains within the most disadvantaged sections of the population within a given country (as some empirical evidence would, indeed, seem to suggest⁹⁸), then the need to tackle the corresponding injustice by shifting our focus from a, if you will, case by case rationale (where different areas of law and legal domains are treated separately) to a more attentive observation of the potential fertility (or current corrosiveness), within

⁹⁷ See, for example, R. Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 LAW AND POLICY QUARTERLY 51, (1979).

⁹⁸ See, for example, Pleasence, P., Balmer, N., Buck, A., O'Grady, Genn, H.. *Multiple justiciable problems: common clusters and their social and demographic indicators*, in 1 J. EMPIR. LEGAL STUD. 301 (2011); Pleasence, P., Balmer, N., Smith, Patel, *Mounting Problems: Further Evidence of the social, economic, health consequences of civil justice problems*, in TRANSFORMING LIVES: LAW AND SOCIAL PROBLEMS (PLEASENCE, P., BUCK, A., BALMER, N. eds., 2011); PLEASENCE, P., BALMER, N., BUCK, A., CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE (2006).

the broader capabilities of disadvantaged individuals or communities, of meeting currently unmet legal needs (or leaving them unfulfilled), becomes rather apparent.

Furthermore, the bifocal attention to the two notion of fertile functioning and corrosive disadvantage is capacious enough to account also for the possible *expressive* significance of expanding people's capabilities (or, conversely, of narrowly curtailing them) to mobilize legal rules and formal entitlements to pursue goals they value, monitoring the highly complex interrelations between, for example, one's conception of her own self and social identity, and her propensity, ability or aspiration, to effectively carry on the effective mobilization of her own rights and entitlements.

For example, in a pioneering work on people's life stories and encounters with the law, Engel and Munger provide a perspicuous description of the different mechanisms that may produce such complex (and largely unexplored) interrelations, in the context of the enactment, in the USA, of the American with Disabilities Act of 1990.⁹⁹

In particular, Engel and Munger, enlarging their focus to include an analysis of how rights are activated in people's everyday lives (beyond, that is, the most formal encounters with the legal system, like trials) find *both* that people's past experiences, forging their sense of identity and social relations tend indeed to *spill over*, affecting the ways in which people see the purpose and use of activating their entitlements, formally recognized, *as well as*, that gaining access to such activation and mobilization may, in turns, allow people to forge new identities and self-conceptions affecting the ways in which they recollect and tell their own stories and past-experiences.¹⁰⁰ Clearly, much more empirical research and local knowledge is required (as Munger and Engel admit) to

⁹⁹ D. ENGEL & F. MUNGER, RIGHTS OF INCLUSION (2003).

¹⁰⁰ *Ibid.*, at 78, 88, 89.

even begin to make qualified claims regarding such interrelations. And yet, the use and exploration of the CA, when aptly integrated with the two observation-concepts presented here, does seem to provide a reliable framework for carrying on an analysis of this kind in an intelligent way – and, which is at least equally important, a sound rationale for doing so.

Fifth, attention to the two notions presented here (and, consequently, the search for sensible information on their actual manifestations within a legal system) would equip courts and policy makers with an intelligent rationale for allocating scarce resources among competing legal claims and needs, by directing them to pay close attention both to the comparative pay offs within the lives of actual and potential parties of protecting one group of indigent parties or another, as well as the actual vulnerabilities associated with unmet legal needs. Recall that the need for such tragic choices in decisions regarding the allocation of a right to counsel constitutes one rather common justification for the exclusion of such right (and, more generally, for a less expansive understanding of procedural rights and guarantees) in the civil context, as opposed to the criminal context. On the contrary, an informed understanding of the possible fertility of a group of procedural arrangements, or, conversely, of the corrosiveness of their absence, might help to (at least) better qualify the rather harsh distinction between criminal and civil proceedings, which the US Supreme Court currently sees as foundational, in allocating the right to legal aid.

For example, gaining such kind of reliable information might help scholars, courts or policy makers more generally, to detect what Wolff and de-Shalit call *inverse cross-*

*category risk*¹⁰¹ (that is, the tendency of people to risk and possibly compromise one or more functionings, in an attempt at securing the enjoyment of other functionings) within unmet legal needs (that is, the possibility that attempting to secure a particular functioning by gaining the protection of the law, may come at serious risk and peril of another important functioning in another domain, or vice versa). Again, much more empirical research is needed even to begin to make educated guesses about the actual frequency (and, correspondingly, relevance) of such phenomena. And yet, an argument of this sort seems to be, rather plausibly, behind the recent international engagement in the field of legal empowerment, on the basic understanding that the use of so-called ‘informal institutions’ by the world poorest might be triggered and even encouraged by the dysfunctionality, or corruption or general inaccessibility of ‘formal institutions’, thus pushing the poor even more to the margins of formal opportunities and rights, leaving them vulnerable to “corruption, exploitation, bureaucratic meddling, the strong arm of the law, and criminals”.¹⁰² In sum, if this is even partially true, then merely relying on legal aid in criminal proceedings, even though its absence would be indeed corrosive, might very well be not very much ‘fertile’, leaving the force that actually pushes people toward risking their physical liberties substantially untouched.¹⁰³

¹⁰¹ WOLFF, J., DE-SHALIT, A., *DISADVANTAGE* (2007), at 124.

¹⁰² See UNITED NATIONS DEVELOPMENT PROGRAM, 2008: 26, 43, 44.

¹⁰³ Reginald Smith anticipated a similar argument in 1919. REGINALD SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR* (1919), at 10: «There exist today businesses established, conducted, and flourishing on the principle that as against the poor the law can be violated with impunity because redress is beyond their reach. [...] The effects of this denial of justice are far reaching. Nothing rankles more in the human heart than the feeling of injustice. It produces a sense of helplessness, then bitterness. It is brooded over. It leads directly to contempt for law, disloyalty to the Government, and plants the seeds of anarchy. The conviction grows that law is not justice and challenges the belief that justice is best secured when administered according to law. The poor come to think of American justice as containing only laws that punish and never laws that help. They are against the law because they consider the law against them. A persuasion spreads that there is one law for the rich and another for the poor».

7. Capabilities or functionings? A reprise.

There is, however, at least one big problem with this approach. Wolff and de-Shalit (consistently within their approach) generally talk of functionings and *not* about capabilities – that is, they are interested in actual achievements, without giving particular emphasis to the individual choice process, which led to their realization. On the contrary, the approach developed here gives particular salience and pays special attention to the protection of *capabilities*, on the understanding that, in the majority of cases, it is capabilities, and *not* functionings, the appropriate goal of social policy in the field of equal access to justice in general, and in legal aid in particular. So, does use of the two notions of ‘corrosive disadvantage’ and ‘fertile functionings’ commit us to reconsider the general judgment which values (for political purposes) capabilities more than functionings?

There are several different issues at play here. For one thing, notice that the problem is with the notion of ‘fertile functioning’, and not with ‘corrosive disadvantage’ itself. The identification of causal pathways between different disadvantages does not commit one, in it and of itself, to choose functionings over capabilities. The notion of ‘fertile functioning’ doesn’t commit one to do so either – but certainly the view, which takes them as relevant for political action, does exactly that. If we want to *act* on the observation of the existence of a fertile functioning, we clearly need to, also, give an argument, which explains why we are, at least in *this* case, choosing functionings over capabilities. There are empirical issues as well: it does look already difficult enough to identify causal pathways between functionings in different areas. And it certainly looks even *more* difficult to identify causal pathways between different capabilities – both

when they are acted upon (and, say, we want to identify the causal role of *choice itself* on a particularly valuable achievement), and, all the more, when the task is nothing less than to identify causal pathways between capabilities, which have not been acted upon.¹⁰⁴

So what to do? Should we give in and talk of functionings alone then? No, we should not.

First, and most generally, whenever we reliably identify a fertile functioning in access to justice and legal aid we can still deliver the service as a capability, while, at the same time, deliver the information on the value of actually acting on it, in order to realize further achievements. Perhaps, lack of one's desire to transform capabilities in one area into valued functionings depends upon the failure to recognize their effects in other areas as well. If *that's* the case, then we do not really need to aim directly at functionings (and push people into them), whereas making visible the connection between functionings would seem to be enough.

Second, the identification of a 'fertile functioning' in a technologically complex service like legal aid is really just the first step. We might begin by saying that the goal is, really, to ultimately push people into one functioning (i.e.: have the assistance of a lawyer at trial), but there are certainly very many different paths through which we can get there, and the distinction between capabilities and functionings will again help us there. For example, even if we found out that *having* the assistance of counsel at trial is, indeed, a

¹⁰⁴ That *doesn't* mean, however, that there is no sense in talking about spillovers of one capability onto others: whatever it is that empirical research can, or cannot, do today *shouldn't* count as reason to dismiss the further reasons we might have to want it to do better in the future. A conservative catholic living in a predominantly catholic country might not find it too hard to understand that the capability to convert, or to choose any other grand metaphysical world-view, which his Constitution (at least formally) grants him, and everyone else in the country, has profound and observable effects on his capability to participate in political life, even if he chooses *not* to convert, and *not* to participate in political life. There is no reason to wait for causal analysis in order to make credible arguments about these links. Appeals to self-understandings could work just as well, as we wait around for empirical confirmation by causal analysis.

‘fertile functioning’, there could certainly be many different ways to implement that. For example, we could still leave room for choice over *who* such counsel will be. And we can aim at reducing the impact of, for example, one’s income on one’s ability to make a palatable choice. Also, we can aim at assuring that, even when one is pushed into having the assistance of counsel, contrary to its own will, we can still aim at making sure that one can exert some control on the counsel’s activities at trial. In all of these cases, we aim at finding an adequate place for personal choice and empowerment, even *after* the identification of a ‘fertile functioning’, and after having decided that such identification is indeed enough for public intervention to take the lead and push people into a particular pattern of behavior.

Third, and finally, Wolff and de-Shalit do not explicitly discuss a further possibility, which seems (speculatively, at least), relevant to the field of access to justice in general, and legal aid in particular. What if ‘fertile functionings’ are not just relevant for *one* individual (longitudinally observed), and they are relevant for a *group* of individuals too. In this case, we would need to measure the fertility of one’s individual functionings for the capabilities and functionings of others.

This thought has some intuitive (but clearly very much speculative) appeal within the field of access to justice, in two ways at least. For one thing, group litigation (like the class action device) could be understood as a way to guarantee beneficial spillovers of one’s chosen functionings (that is, the chosen achievements of active class members who are party to the litigation itself), for the capabilities and functionings of others (absent class members). The critical normative issue here then is to justify limitations to a (potential) party’s liberty to choose whether to join litigation, and control its strategic

development, in order to protect its further functionings and capabilities (and the capabilities and functionings of active plaintiffs). I take up this question in the next chapter, which focuses directly on group litigation and class action.

But consider now another, more general example: as Jessica goes and consults with a lawyer over *one* legal problem, which many of Jessica's friends have (say, how to ask for a welfare benefit or contest a denial of benefits), Jessica *and* her friends might find out useful and practically relevant information on how to tackle it appropriately. We learn about legal opportunities and institutional short-cuts to problem solving and dispute resolution, this is the thought, *also* in virtue of the peculiar social networks, which are at our disposal.

Now, the example doesn't help to make the contrast between capabilities and functionings vanish, to be sure. But it does suggest that *one* strategy to go around it could be to scale up public intervention. Instead of pushing one service that we judge (perhaps reasonably) essential down the throat of *one* individual beneficiary (say, representation at trial), we make a more generalist service (say, legal consultancy) available to an even greater number of beneficiaries, on the expectation that this could increase the probabilities of effective use by *someone*, and this, in turns, will then transfer to the capabilities of others first, and then, eventually, to their actual functionings too.

8. On modeling the delivery of legal aid: institutional limits and political challenges

So far, this chapter discussed political and legal argumentations about the provision of free counsel for the indigent, looking at landmark cases of the US Supreme Court and the European Court of Human Rights.

On the constructive side, this chapter argued that we have good reasons to recognize expensive political and institutional commitments, on the part of Governments, to provide free counsel for the indigent – people who aren’t able to pay for their lawyers, this chapter has argued, have a legitimate claim to public support in many areas of their lives. On the destructive side, this chapter has argued that many of the traditional argumentative strategies, which courts have used to establish limitations to such commitments for specific classes of claims or cases, do not hold up to reasonable scrutiny. As we have already argued earlier on in this essay (in chapter 1 especially), favoring defendants in proceedings in which they risk their personal liberty (by recognizing a categorical right to counsel to criminal defendants, and to them only) over defendants in non criminal proceedings, and over plaintiffs in civil proceedings, doesn’t track reliable distinctions and results in unfair allocations of the relevant right. Many parties (like *Lassiter*, or *Ayers*) in non-criminal proceedings have a legitimate claim to public support, but a mere utilitarian calculus (like the *Mathews* test) in these cases, I have argued, doesn’t capture all considerations, which are relevant for fair allocations.

A CA, I concluded, helps us to explain and justify the significant expansions in public commitments in (*both* criminal *and* civil) legal aid, which relevant laws and practices of constitutional interpretation have achieved in *both* the US and in Europe throughout the 20th century, because it helps us to move from a formal understanding of procedural rights, to one centered on the real opportunities for meaningful action which the latter protect, or hinder. Correspondingly, a CA helps us to identify the current limits, which current laws and practices of constitutional interpretation impose on the further development of public commitments in legal aid in the 21st Century: The point of the

provision of counsel in *both* criminal and civil proceedings (and in all the further subcategories, in which one jurisdiction might wish to divide its adjudicative processes) is not limited to the protection of one's physical liberties against external coercion and attack by the state. Rather, it fits within a wider social strategy, deliberately aimed at the protection of people's vulnerabilities against exploitation and domination by others.

Furthermore on the constructive side, we introduced two observation concepts, which could help us to prioritize claims, in a comparatively more reasonable way. Identification of 'fertile functionings' and 'corrosive disadvantage', I have argued, might help us to prioritize claims and direct public support, whenever we face the hard choice of allocation of scarce public resources in access to justice.

Finally, and again on the destructive side, we noted one big problem with one of such observations-concept ('fertile functioning'), as it presses on the interpreter the uneasy choice between capabilities and functionings as the preferred goal for social and political action in the field of access to justice.

Since the above analysis clearly doesn't lend itself to easy political generalizations and, much less, to the formulation of an overarching principle of institutional design and implementation, let us then leverage these insights (and the ones, which we have accumulated so far in this essay), by discussing and criticizing the different ways in which different countries have historically modeled the delivery of legal services to those who cannot afford them.

Traditionally, scholars have identified at least three different models for the provision of legal aid – a) the *pro bono* model; b) the *judicare* system; c) and the

salaried-staff model.¹⁰⁵ It is important to understand these models as useful general references, and remember that any given jurisdiction displays both variations within the referenced model itself, as well as hybrid features, cutting across different models. In the following, such further differences and distinctions will be presented as responses (or attempts to respond) to the specific difficulties of each model (in its pure form) in meeting its objectives.

a) Perhaps the easiest, and most straightforward, way to organize the delivery of legal services to those who cannot afford them is to encourage (or even impose a duty on) lawyers to devote at least a portion of their time and professional activities to the representation of and the consultancy to, indigent clients. This is, at base, the *pro bono* model of legal aid: private members of the bar in a given jurisdiction, who, at times, represent ‘poor’, or ‘low-income’, or ‘needy’ clients, without charging them a fee.¹⁰⁶

There is a sound political, and ethical, rationale in supporting these efforts. Chapter 7 argued that structural conditions in any market for lawyers typically cause significant deviations from the norm of perfect competition, and allow lawyers to take advantages (particularly because of the inherent uncertainties in the ‘product’, which they sell) from their privileged position. So, it should only be fair then to organize things in such a way as to try and compensate these advantages by ‘inviting’ lawyers to provide

¹⁰⁵ These categories were introduced and standardized by M. CAPPELLETTI & B. GARTH, *Access to Justice: the Worldwide movement to Make Rights Effective – a General Report*, in ACCESS TO JUSTICE: A WORLD SURVEY, VOL. 1 (MAURO CAPPELLETTI, GARTH BRYANT eds., 1978). For further discussion, and specifications, of these categories, see Fanlo Cortés, I., *Poverty and Access to Justice: Rethinking Legal Aid Models*, in LAW, POLITICS AND MORALITY: EUROPEAN PERSPECTIVES III (J. FERRER BELTRÁN & SUSANNA POZZOLO EDS., 2007): 205 – 228; and MACHADO DE CASTRO, A.L., C.F. ALVES, D. ESTEVES & F. R. A. SILVA, ACCESS TO JUSTICE IN BRAZIL (2017).

¹⁰⁶ For accounts of recent developments of *pro bono* in the US, see PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION (R. GRANFIELD & L. MATHER EDS., 2009); for critical comments see, in the latter volume, R.L. Abel, *State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms*, at 295–307; see also S. Cummings, *The Politics of Pro Bono*, 51 ULCA LAW REVIEW 1 (2004) and F. REGAN ET AL. (EDS.), THE TRANSFORMATION OF LEGAL AID. COMPARATIVE AND HISTORICAL STUDIES (1999).

services free of charge, for specific classes of individuals. Indeed, some basic recognition of such ethical pressures (pushing lawyers to provide charitable contributions to the ‘poor’ and ‘needy’, by devoting some of their time to their representation) might explain the recurring frequency of charitable arrangements between lawyers and their ‘poor’ clients, as well as their long lasting effects, across very different societies and since (at least) the Middle Ages, up until the present day.¹⁰⁷

Of course, a fair institutional allocation of a (long recognized) ethical duty doesn’t guarantee that its effects will be satisfactory at all, especially from the point of view of those who have legitimate claims to the relevant service. The long history of charitable arrangements in the delivery of legal services easily shows why relying *exclusively* on private lawyers’ *pro bono* efforts will *not* be enough to meet the normative standards of equal access to justice.

First, this is charity, *not* justice: indigent clients address themselves to the benevolence of their lawyers, who, second, can (their ethical constraints notwithstanding) easily pick and choose which clients, and which claims, it is most convenient, for them, to represent and provide their services to. Third, private lawyers acting on charitable motives could hardly develop the organizational capacity to identify, and then act on the identification of, what I called, either corrosive disadvantages, or fertile functionings in the delivery of legal services, and much less have any incentive to tailor their competences and specializations to the demands of their less affluent clients. This means,

¹⁰⁷ For a short, historic, and comparative account, see I. Fanlo Cortés, *Poverty and Access to Justice: Rethinking Legal Aid Models*, in *LAW, POLITICS AND MORALITY: EUROPEAN PERSPECTIVES III* (J. FERRER BELTRÁN & SUSANNA POZZOLO EDS., 2007): 205 – 228; for a more extended treatment, see TROCKER, N., *ASSISTENZA LEGALE E GIUSTIZIA CIVILE* (1979) and M. CAPPELLETTI, J. GORDLEY, & E. JOHNSON (EDS.), *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (1975), at 16 ff. For an extensive history of the English model, see E.J.T. MATHEWS & A.D.M OULTON, *LEGAL AID AND ADVICE* (1971), Chapter 2 especially.

fourth, that the prioritization of claims and clients is made, at best, with little regards to the strategic value (for the claimant itself, or for other claimants, who are similarly situated) of any individual claim, or, at worst, with the explicit intent to *marginalize* specific clients, and their claims, even further to the sidelines. Finally, *pro bono* work by private lawyers could hardly provide, in it and of itself, productive integrations of formal legal advocacy within political advocacy in general, or community outreach and education more particularly.

But charitable services provided by private lawyers are *not* the only known form of *pro bono* work in access to justice. Law schools, and universities across the world generally, have for a long time now included in their *curricula* ample opportunities for professional, or experiential, training for their students, by instituting free legal clinics, open to low income clients, in many different areas of professional service and legal specialization.¹⁰⁸ Just like in the case of *pro bono* work by private lawyers, a very similar political and ethical argument justifies the institution of clinical training within the standard law school *curriculum*. Practicing law typically requires formal training, which grants, in turns, as we have seen, a privileged position in social cooperation. So it should be fair to expect that the costs of such training include service to, and for the benefit of, low-income, or poor, clients. All the more so when formal training is acquired through public universities and, thus (at least part of) its costs are financed by the public purse too.

¹⁰⁸ This is, again, an international phenomenon, and, thus, variations among cultural traditions and legal histories should be accounted for in any credible evaluation. For an insightful analysis in the US context, see S. Wizner & J. Aiken, *The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM LAW REVIEW 997 (2004);

In many ways, the provision of legal services through legal clinics effectively responds to the structural challenges of *pro bono* work by private practitioners. This is not charity. Clients address students – who work to acquire educational credits, and a grade – and their professors – whose *job* is to supervise the work of students, and train them on how to work like professional lawyers. Furthermore, connections with academic research might provide resources for developing more nuanced perspectives on the individual claim, and client, who is seeking representation, and the organizational capacity for systematic data collection, experimentation and testing over long periods of time. However, the most obvious incentives acting on those who control (at least in part) such resources are to increase the quality of professional training experiences of students, and it is very hard to predict when, and at which conditions, such incentives might eventually conspire to produce reasonable prioritization of claims and clients (one big issue being specialization, with clients possibly benefitting from it, and students benefitting from versatile, and varied, experiential learning instead).

Another model for the *pro bono* delivery of legal services is associative *pro bono*. In this model, non-governmental associations deliver legal services either through their salaried staff, or voluntary workers, in light of the associational purposes, which justify their institution.¹⁰⁹ Again, these forms of *pro bono* legal services meet (at least some of) the challenges and obstacles of the previous forms. Again, this is not charity, since the prospective client addresses itself to a professional worker, who operates on the basis of a

¹⁰⁹ This category contains so many different things, in so many different jurisdictions, that its discussion as a *single* item is bound to breath an air of confusing abstractions and reckless generalizations. Still, it is worthwhile to have a single name for it, if only to identify it as a relevant variable in the delivery of legal aid, and then work on the identification of what causes it to change within different legal systems. Furthermore, one significant source of variations (both diachronically within one jurisdiction, as well synchronically among different ones) is the connection between these associative organizations and the use of group litigation mechanisms, and, thus, the legitimacy of the latter as a method of dispute resolution (which is a topic for the next chapter).

mandate, based upon specific associative ends and purposes. Furthermore, non-governmental associations can develop the organizational capacity for strategic planning, and experimental testing and learning across different cases and classes of individuals – thus, they have the organizational capacities for reasonable prioritizations of claims. One big risk here is in creating patron-clients relations among the beneficiaries, or at any rate, in favoring the creation of such relations, by either restricting access to the relevant service to members only, and thus conditioning access to the benefits of the service on obedience to the larger associative goals and ends; or, by stereotyping a ‘good’ and ‘worthy’ beneficiary, and stigmatizing a ‘bad’ and ‘unworthy’ one.¹¹⁰ Another, related, big risk, is the systematic compromise of an individual client’s interests and goals, with the common interests and goals of the whole association.

b) Not surprisingly then (given the limitations of the *pro-bono* delivery of legal service), the biggest point of departure for *both* access to justice scholarship and practice came with the introduction of so-called *judicare* models. In its classic and most iconic expression, the *judicare system* aims at transferring the financial costs of lawyers away from low-income parties (and their charitable lawyers), to the State, by guaranteeing public compensation of private attorneys, representing low-income clients. Historically, the model flourished as the 20th century Welfare State flourished; and it quickly waned as public commitments to the Welfare State waned too.¹¹¹

¹¹⁰ For an analysis of these risks in the history of associative *pro bono* throughout the early years of legal aid in the US, see S. Ossei-Owusu, *A People’s History of Legal Aid: A Brief Sketch*, in ROUTLEDGE HANDBOOK ON POVERTY IN THE UNITED STATES (2014).

¹¹¹ I am referring here, especially, to the system instituted in England by the Legal Aid and Advice Act 1949. On its genesis, see E.J.T MATHEWS. & A.D.M OULTON, LEGAL AID AND ADVICE (1971); see also, S. POLLOCK, LEGAL AID – THE FIRST 25 YEARS (1975) and Id. in M. CAPPELLETTI, J. GORDLEY, & E. JOHNSON (EDS.), TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975), at 343.

In retrospect, this historical development makes a lot of sense. First, because it relies on a clear diagnosis of the relevant problem: *the* problem in equal access to *justice* is, so the presupposition was, access to *lawyers*. And the problem with access to lawyers is the more general problem of unequal distribution of wealth in a given jurisdiction. It follows, then, that the solution should be for the State to compensate the costs of lawyers, for the benefit of those, who cannot afford them. Second, and consequently, because the *judicare* system easily appears as a most ‘natural’ institutional specification of what rights-language in the field of access to justice commits States to. If having the assistance of an attorney is a *right* that people have, then States should commit themselves to remove all barriers, which effectively prevent the concrete realization of such right. And that means (if the above diagnosis is correct), that the State ought to compensate the costs of lawyers, for the benefit of those, who cannot afford them. Third, political action and engagement in the field of access to justice turns on the formulation of suitable definitions of which, and whose, claims trigger the relevant public commitment to provide the assistance of counsel – in order for any *judicare* system to work, we need reliable and suitably general definitions of when and why the provision of counsel should be guaranteed as a matter of right.

So, given its historical development, what are the expected limitations of a *judicare* system in the protection of equal access to justice in general, and the provision of legal aid in particular?

For one thing, a *judicare* system (at least in its purest form) operates on a too narrow definition of the goals and point of equal access to justice for all, by merely focusing on access to *lawyers* as the sole problem for, and solution to, equal access to

justice.¹¹² As we have argued throughout this entire essay, the latter should be understood within a larger system of goals and values, aimed at protecting democratic equality. Within this framework, the provision of lawyers, even to those who cannot afford them, is *one* tool (among many others) to be used for that purpose. A narrow definition of the problem is both *immediately* harmful (since it precludes the exploration of larger reform strategies), as well as risky in the long run, since the high hopes, which it initially generates about proposed solutions, invite all-out skepticism about their marginal help, when recalcitrant *data* partially disconfirm expected results.

Also, and more specifically, a *judicare* system offers a market-based solution to the problem of legal aid, but it does relatively little, in it and of itself, to cure the structural distortions, which typically affect the market for lawyers. In particular, it doesn't seem to be able to strategically manage the significant spillovers (both positive, and negative) connected with individual use of legal services. Private lawyers, who are compensated by the State on a case-by-case basis, have little incentive, and fewer organizational capacities, to reasonably prioritize the delivery of their services, by reliably identifying either corrosive disadvantages, or fertile functionings in the delivery of legal aid. In fact, private attorneys offer to public authorities a quick and easy strategy to reduce costs, *without* having to justify the decision through explicit restrictions and limitations to formal entitlements. All that they need to do is, for example, to delay compensation for legal aid services of just about the time necessary for private lawyers to

¹¹² This is, indeed, the first and most radical criticism of the English Judicare system of the second half of the 20th Century. See, especially, B. ABEL-SMITH & M., ZANDER & R., BROOKE, LEGAL PROBLEMS AND THE CITIZEN. A STUDY IN THREE LONDON BOROUGHs (1973).

dynamically respond by accepting *fewer* cases of low-income clients.¹¹³ Finally, a *judicare* system, by merely focusing on the *existing* demand for legal services, doesn't address the uncertainties about law and legal services – it doesn't help to resolve evaluative uncertainties of the 'product', nor does it help to cure the fact that its demand responds to needs, which are unpredictable in origin.

c) The third traditional model of legal aid is the salaried-staff model. At base, legal services are provided here by lawyers who are directly employed by public institutions, which integrate them within a civil service.¹¹⁴ Lawyers receive a fixed salary, which is directly paid by the public purse and, thus, they do not charge clients (that is, they *must* not charge them) for compensation.

Again, the salaried-staff model of legal aid can be seen as an attempted institutional response to the difficulties and challenges of earlier models. For one thing, a salaried-staff can develop specialized knowledge and expertise, and the organizational capacity for strategic planning. This means, in turns, that it can develop the competency for the identification of reasonable priorities in different areas of need, and for the integration of technical/legal work, within community outreach and activism. This is not a market-based solution to the problem of legal aid, but it addresses the distortions caused by the structural conditions of the market for legal services up front. Furthermore, its encroachment within a public bureaucracy as a civil service protects it against sudden retrenchment of public commitments, and guarantees that it is understood among the

¹¹³ For hints on this mechanism, see V. Denti, *Patrocinio dei non abbienti e accesso alla giustizia: problemi e prospettive di riforma*, FORO ITALIANO, V. (1980).

¹¹⁴ Many jurisdictions provide public defenders to indigent criminal defendants through a salaried-staff model of legal aid. But there are prominent examples even in civil matters, like the Brazilian *Defensoria Publica* and the Argentinian *Ministerio Publico de la Defensa*. On the first one, see D. ESTEVES & F.R.A. SILVA, *PRINCIPIOS INSTITUCIONAIS DA DEFENSORIA PUBLICA* (2017).

general population as an essential service and, as such, as a suitable target for public criticism and political engagement.

Unfortunately, each of such advantages comes at significant costs. First, at least formally, the provision of legal services through a public bureaucracy typically diminishes clients' room for choice over *who* their lawyers shall be. Second, the institution of a public bureaucracy could easily be, depending on the background conditions of the jurisdiction at hand, a difficult political goal to negotiate and secure – which, in turns, could determine significant restrictions and limitations to the organizational capacities of the institution itself, if created. Third, its creation among *other* public institutions requires rigorous protection against political meddling and interference, in order to avoid the risk of establishing (much like in the case of associative *pro bono*) patron-clients relations between public bureaucrats and prospective clients – all the more dangerous because directly backed up, this time, by political power, and formally sanctioned by public institutions themselves. Fourth, a salaried-staff can well accumulate the informational and organizational capital required for suitable interpretations of legal aid within the larger system of goals that, this essay has argued, justifies the point of equal access to justice for all, and motivates its recognition as a reasonable political goal and an imperative of justice itself. And yet, they might lack the incentives (material, or otherwise) to *match* such wide determination of goals with the appropriate effort to realize them.

9. A tentative evaluative synthesis

In the last section we have laid out alternative models of legal aid, and identified attractive features for each one of them. Promising as these features are, however, they all come at significant costs too. Luckily, they do not appear to represent incompatible alternatives. Which means, in turns, that public deliberation about which model to choose in any given jurisdiction can both experiment different combinations of such features and then pick and choose the most fitting ones, given the context at hand.

To begin, *pro bono* work by private lawyers seems the easiest model to implement, even across very different jurisdictions. Formally, it only needs, on one hand, the abolishment of a few restrictions in the regulation of the legal profession, which, for example, impose mandatory fees for the provision of legal services. On the other, it advises the introduction of new requirements for maintaining one's admission to the local bar. Both kinds of measures might represent politically tough sells to make, but they certainly do not require institutionally demanding design and planning. This is just the work for political and social mobilization.

Marginal increases of *pro bono* work by legal clinics at law schools and universities do not seem to require much institutionally demanding design and planning either. One means of implementation could be to introduce (or increase) requirements (in terms of class-credits) for admissions to the bar. Competition among schools could then work to increase the quality of experiential training by students and, then, affect spillovers in terms of better service to clients.

All in all, the employment of a salaried-staff, both within the associative *pro bono* model, as well as within the public civil service model, seems the best available means to

integrate the various goals of legal aid, within a reasonable political framework. Notice that encroachment within a public bureaucracy is *not* the only way to direct public funds to a salaried-staff.¹¹⁵ An alternative method is to channel funds through a public financial vehicle, which could then allocate grants to not-for-profit organizations. There are significant advantages in doing this. For one thing, competition between different organizations could work to secure (even if only indirectly) clients' choice of their lawyers. Also, the non-public character of such organizations (and, thus, the possibility of raising non-public funds too) could work to protect them against cutbacks and restrictions by unfavorable changes in the political landscape.¹¹⁶

¹¹⁵ On the relevant experiment of so-called Neighborhood Law Offices, implemented in the US in the 1960s, see GARTH, B., *NEIGHBOURHOOD LAW FIRM FOR THE POOR* (1980).

¹¹⁶ On this problem, see C. R. Albiston, & L. B. Nielsen, *Funding the Cause: How Public Interest Law Organization Fund their Activities and Why it Matters for Social Change*, 39 *LAW & SOCIAL INQUIRY* 62 (2014); see also S. Cummings & D. Rhode, *Public Interest Litigation. Insights from Theory and Practice*, 36 *FORDHAM URB. L.J.* 604 (2009).

13. IS GROUP LITIGATION LEGITIMATE?

1. Introduction.

Group litigation appears in many different forms, and versions, throughout the world. Its problems, challenges, and prospects for reform are thus the problems, challenges and prospects for reform of a clearly collective, and plural, entity.¹ They resist sweeping

¹ For general analysis of the class action device, see R. Bone, *Class Action*, in PROCEDURAL LAW AND ECONOMICS 67 (CHRIS WILLIAM SANCHIRICO ED., 2d ed. 2012) (This chapter contains a short introduction to the class action device, it reviews leading law and economics literature on class actions, and assesses several different reform proposals; the chapter distinguishes between a “large claim class action, [which] consists mostly or entirely of plaintiffs with marketable claims, that is, plaintiffs who have enough at stake to justify hiring an attorney and suing individually” and a “small claim class action, [which] consists mostly or entirely of plaintiffs who have unmarketable claims, that is, plaintiffs with too little at stake to justify hiring an attorney and suing individually”); C. Hodges, *Collective Actions*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (P. Cane and H. Kritzer eds., 2010) and ID., *US Class Actions: Promise and Reality*, in THE TRANSFORMATION OF ENFORCEMENT (H-W MICKLITZ AND A. WECHSLER EDS, 2016). For a general comparative perspective, see M. Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT’L L. 405 (2001); M. Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, in II ACCESS TO JUSTICE: PROMISING INSTITUTIONS 769 (M. CAPPELLETTI & J. WEISNER EDS.) (1979); HENSLER DR, C. HODGES & I. TZANKOVA (EDS), CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION (2016); ANDREA GIUSSANI, STUDI SULLE CLASS ACTIONS (1996); for Europe: HARSAGI V., & C. H. V. RHEE (EDS.), MULTI-PARTY REDRESS MECHANISMS IN EUROPE: SQUEAKING MICE? (2014); ELIANTONIO, MARIOLINA, C. W. BACKES, C. H. VAN RHEE, T. N. B. M. SPRONKEN & A. BERLEE (EDS.), STANDING UP FOR YOUR RIGHT(S) IN EUROPE. A COMPARATIVE ON LEGAL STANDING BEFORE THE EU AND MEMBER STATES’ COURTS (2013); C. Hodges, *Collective Redress in Europe: The New Model*, 7 CIVIL JUSTICE QUARTERLY 370 (2010); CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS: A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE (2008); G. Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT’L L. 369 (2001); R. Nordh, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms and a Forthcoming Proposal*, 11 DUKE J. COMP. & INT’L L. 381 (2001); for Latin America: JOSÉ MARIA SALGADO, TUTELA INDIVIDUAL HOMOGÉNEA, CONFLICTOS, DERECHOS Y PRETENSIONES COLECTIVAS (2011); M. Ucin, *El rol de la Corte Suprema ante los procesos colectivos*, 1 REV. DER. PROC 329 (2009); LEANDRO GIANNINI, LA TUTELA COLECTIVA DE DERECHOS INDIVIDUALES HOMOGÉNEOS (2007); FRANCISCO VERBIC, PROCESOS COLECTIVOS (2007); EDUARDO OTEIZA (ED), PROCESOS COLECTIVOS (2006); for historical perspectives, especially on the US class action device, see D. Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587 (2013); G. Hazard, J. Gedid and S. Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PENN. L. REV. 1849 (1998) (detailing the uncertain ‘conditions of precedent’ on the issue of *res judicata* in class suits, since the 18th century up until the end of the 20th); R. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990); STEPHEN YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

theoretical generalizations just as much as categorical practical thinking. However, the conceptual exploration, which this essay began with, provides some help, since the three interpretations of equal access to justice that we discussed (equal access to justice as ‘equal protection of the law, or as ‘equal standing in open court’, or as ‘agency in legal affairs’)) jointly offer a rather clear way of finding unity in pluralism, through ideal-type taxonomy.

Here is a rather classic, simple, but illustrative way of presenting the field. Group litigation is typically designed by identifying particular classes, or sets of interests, which lack effective legal protection, notwithstanding the fact that they seem to be recognized by formal laws as worthy of public support. Typically, public institutions fail to provide effective legal protection to such interests, because the latter’s structure and content (Who has them? Why are they valuable for each individual, and for each individual taken as a member of a larger group?) tend to cause inefficiencies in individual litigation, in at least two general senses: 1) the relevant costs of enforcing them through individual litigation are bigger than the benefits, which those who have to bear these costs can extract from it; and yet, 2) the *social* benefits of managing litigation in a different way (by rearranging the distribution of the relevant costs) could be shown to justify the imposition of the relevant costs.

This might happen, for example, when aggregation of individual claims allows public institutions, as well as private actors, to save procedural costs, without increasing errors in adjudication. So, the purpose of group litigation is to aim at a more efficient fit between formal substantive laws and rights, and the outcomes of potential litigation.²

² On the general functions of the class action device, see E. Cabraser, *The Essentials of Democratic Mass Litigation*, 45 COLUM. J.L. & SOC. PROBS. 499 (2012) (arguing that the class action device is meant to

Operationally, this means that, by and large, when legislators normatively design group litigation, they should identify which structural, procedural conditions in individual litigation substantially limit, or entirely block, effective legal protection of which kind of interests.³

provide efficient means for addressing mass harms, and protect democratic principles in the adjudication of consumer rights, public health and safety, and human rights violations); G. Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24 (2012) (arguing that “The justification for class actions rests on two main grounds: compensating victims whose claims are too small to be brought individually and deterring wrongdoing by aggregating claims to facilitate private enforcement”, and concluding that the ‘de-coupling’ of injunctive relief from monetary relief which the Supreme Court affected in Wal-mart is bound to reduce private attorneys incentives in bringing class actions – by reducing their expected fees – and thus will significantly hamper class actions’ deterrent potential); JOSÉ MARIA SALGADO, TUTELA INDIVIDUAL HOMOGÉNEA, CONFLICTOS, DERECHOS Y PRETENSIONES COLECTIVAS (2011), esp. at 8 (‘practical objectives’) and 15 (‘political and social objectives’); A. Erbsen, Allan, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995 (2005) (arguing that scholars have traditionally focused on three main topics: 1) “the potential utility and fairness (or disutility and unfairness) of aggregating individual claims as a solution to collective action problems that inhibit enforcement of substantive rights”; 2) “the extent and significance of agency costs and diminished individual autonomy in representative litigation”; 3) “the relative roles that courts, legislators, and administrative agencies should play in redressing widespread injuries”); S. Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, SUP. CT. REV. 337 (1999) (the article identifies the two central questions which courts should address as they try to draw the line between the “efficiency mandates of aggregate dispute resolution and the fairness concerns of the absent class members”: 1) “the necessity of class treatment to overcome collective action barriers to the prosecution of perceived group harms”; 2) “the question of who should control the class action and under what terms”; by focusing on the governance of class action especially, the article argues, *inter alia*, that “it is useful to think of the class action mechanism as fundamentally a centralizing device designed to accomplish some of the same functions as performed by the state, particularly in those situations in which the state has not or cannot perform its regulatory function, or it would be inefficient for the state to undertake such regulation directly. In such circumstances, the class action delegates to private individuals the power to lead a diffuse group in a collective endeavor, provide internal equity in the treatment of group members, and spread the burden of collectively financing the endeavor across the entire group”).

³ See, for example, H. Kalven, & M. Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941) (One the first essays which identified the existence of so-called negative value lawsuits and the – strictly related – grave limitations of administrative agencies in concretely enforcing the – then emerging – broadly dispersed rights recognized by special statutes, in the new ‘regulatory state’ envisioned by the New Deal); B. Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497 (1969) (The essay collects the thoughts of the reporter to the Advisory Committee on Civil Rules, following the first reception by courts of the revised Federal Rule 23, after the 1966 reform: “The reform of Rule 23 was intended to shake the law of class actions free of abstract categories contrived from such bloodless words as ‘joint,’ ‘common,’ and ‘several,’ and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties.[...] The entire reconstruction of the Rule bespoke an intention to promote more vigorously than before the dual missions of the class-action device: (1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”); B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967).

In some, perhaps most, instances, group litigation is said to be *damage oriented*.⁴ Here, the point of group litigation is to design ‘litigation units’ (that is, *who* are the formal parties of a case) as to achieve, in a cost-effective way, a final and binding judgment, granting damages (compensation for damages, that is) to a numerous class of injured people. In US Federal law, these are, characteristically, the class actions, which are governed by Rule 23, b (3), of the Federal Rules of Civil Procedure: there is a common question of law, or fact, which predominates over individual ones and the class action offers a superior method (in terms of fairness and efficiency) to other available methods of adjudication.

In other instances, group litigation is said to be *reform-oriented*. Here, the purpose of group litigation is to design ‘litigation units’ in a way, which could favor the achievement of, typically, but not exclusively, an injunctive or declaratory relief, which should aim at displacing entrenched and habitual, but legally prohibited, social practices, carried out by identifiable social actors (i.e.: either public or private institutions, such as schools, banks, prisons, hospitals, private employers...) against a large group of individuals. In US Federal Law, these are, characteristically, the class actions, which are governed by Rule 23 b (2): the defendant has acted, or refused to act, on grounds which apply generally to the class, so that injunctive or declarative relief is thought to be appropriate with respect to the class as a whole.⁵

⁴ M. Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT’L L. 405 (2001); RICHARD NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007); D. Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002); JACK WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995); PETER SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

⁵ See, for the classic doctrinal illustration of the structural effects of the introduction of such kind of class action device on due process, and the role of judges in particular, see A. Chayes, Abram, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); but see R. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH J.L. REFORM 647 (1988) (Noticing the odd timing of Chayes’ focus on

The design of ‘litigation units’ takes many forms too, but it is traditionally achieved with a few common procedural tools and techniques; namely, rules of standing and rules regarding claim or issue preclusion.⁶ We typically either grant standing to one super-individual party (like an association, or a union, or even a public prosecutor) to act on behalf, as a representative, of its individual members, and then preclude the latter from autonomously litigating the claim, or issue, which directly affect their legally recognized interests; or, we grant standing to one individual party who, acting on behalf (that is, as a representative) of a class of other individuals, share some of the benefits (and, possibly, costs) of litigation with them – and, thus, *his* litigation choices produce binding effects on *them* too.

So, to sum up, through a limitation of party autonomy (i.e.: reducing, or even *de facto* excluding, the amount of personal, formal, control one party enjoys over its own case in individual litigation), and by altering standing rules, or rules of preclusion (i.e.: allowing a super-individual party to litigate on behalf of its members; or reducing, or even *de facto* excluding, one’s formal opportunities to litigate claims or issues whose

public law litigation, as “the kind of lawsuits he had in mind – school desegregation and prison conditions case – was waning even as he wrote.”). For a recent historical reconstruction of the class action device as a means to ‘public law litigation’, see D. Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011) (reconstructing the story of Rule 23 (b) (2) class actions by mining transcripts, letters and memoranda of the authors of the 1966 amendments, and thus chronicling a ‘procedural chapter’ within the legal campaign against Jim Crow, in order to conclude that the desegregation cases constituted the main (or the sole) doctrinal foundation of 23 (b) (2) classes. Professor Marcus concludes, convincingly, that “Judicial sympathy for racial integration and the 1966 authors’ political commitments, rather than some conception of what due process requires, best explain why Rule 23 requires the mandatory class treatment of injunctive relief claims”. This much doesn’t mean, however, that no coherent conception of due process could ever justify mandatory class treatment. What we need, as this section will try to show, is a political conception of due process which could make judicial sympathy for racial integration and a political commitment to racial equality more generally, two imperatives of procedural justice); for a more recent update on contemporary public law litigation C. Sabel, Charles & W. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARVARD L. REV. 1015 (2004);

⁶ See R. Bone, *Class Action*, in PROCEDURAL LAW AND ECONOMICS 67 (CHRIS WILLIAM SANCHIRICO ED., 2d ed. 2012).

resolution in preceding litigation binds one too) procedural rules are used here to increase the prospects of effective legal protection for otherwise vulnerable interests and rights.⁷

Now, these are all very general observations still. Proposing a common vocabulary for perspicuously stating a problem is certainly an achievement. But not much of one, if the words, which are then ultimately used, carry a heavy and ambiguous conceptual baggage; and, as we have seen at the outset of this essay, it is clearly very difficult to integrate the three interpretations of equal access to justice in a coherent system of thought, substituting ambiguity with clarity. Furthermore, alongside such rather specific procedural forms and techniques, group litigation typically displays much variance. Its general trends and prospects for change in comparative law are traditionally hard to pin down, and yet at the same time call into question, and put pressure on, a long list of recurrent features of modern and contemporary judicial administration and state authority.

I am interested particularly here in an argument which begins from a very similarly looking place to the one this essay starts from (the North American individual right to a day in court, and the interpretation of the point of equal access to justice as protecting equality of standing in open court, respectively) but which, contrary to the argument that this essay proposes, ends up observing a much starker tension between the justification of group litigation and the protection of democratic cooperation among equals – call this the ‘right to a day in court’ argument.⁸ Group litigation is a threat to democratic legitimacy, according to such argument, because it imposes illegitimate limits

⁷ For a detailed, and technical, analysis of the problem of ‘finality’ within the class action device, see W. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790 (2007);

⁸ See MARTIN REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 2009.

to one's right to a day in court, whose protection constitutes a foundational component of public respect for individual autonomy and dignity.⁹ Extensive limits to such right threaten one's autonomy and thus harm the democratic legitimacy of public institutions. Now, the right to a day in court argument has different threads, it is quite technical and, in many ways, culturally specific, so its treatment calls for some simplifications. However, the critical issues on which my argument turns can be identified with relative ease, without any loss to technical precision.

Here is an anticipation of what is about to come: The right to a day in court argument enlists one's right to a day in court among, what we have called (following Sen), the process-aspects of freedom and detects a tension between these and outcome-based, opportunity aspects of freedom, which are instead taken to justify group litigation as a whole. Process aspects of freedom are then understood to confer legitimacy to adjudicative outcomes: no outcome is legitimate, according to this analytical framework, unless it is produced by the right kind of procedure. So, limitations to one's right to a day in court (which are technically necessary to design group litigation procedures) threaten the legitimacy of adjudicative procedures.

The critical issue here lies in the rigid separation of the argumentative work, which is carried out for the evaluation and assessment of group litigation. Group litigation is justified by looking at the outcomes that it produces, but then risks to lose its legitimacy by limiting individuals' procedural rights in standard adjudication.

⁹ On the right to a day in court in US case law (and its relevance for representative adjudication), see, most recently, *Taylor v. Sturgell*, 553 U.S. 880 (2008) (noting that the extension of the preclusive effect of a judgment to a nonparty runs up against the 'deep-rooted historic tradition that everyone should have his own day in court', and thus disapproving the theory of preclusion by 'virtual representation'); *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996) (elaborating on and applying the general principle according to which one is not bound by a judgment in a litigation to which he is not a party, on the basis of the "deep-rooted historic tradition that everyone should have his own day in court").

Crucially then, an outcome-based approach to equal access to justice which can still account for the latter's contribution to the legitimization of adjudicative procedures (like the one which is proposed throughout this essay) might be able to, at once, give a reasonable account of legitimacy concerns in adjudication, while at the same time producing a firmer defense of group litigation from the point of view of democratic legitimacy itself.

Put differently, outcome-based justifications of group litigation typically center their analysis of 'litigation units' on the potential efficiency gains, which could stem from representative litigation. Process based approaches, like the right to a day in court argument, typically retort that what procedures gain by efficiently designing 'litigation units' through group litigation, they might lose in the legitimacy of their outcomes. However, the outcome based approach developed here, this is what I shall try to show, does not limit the justification of group litigation to efficiency arguments alone. To be sure, I shall argue (with many others) that group litigation should be designed to promote efficiency in 'litigation units'. But this is not efficiency for efficiency sake. What we should demand is to protect democratic equality from the potential harms of inefficiency in litigation units. Recognizing this much does not obliterate, as we shall see, legitimacy concerns with group litigation; but it does cast new light on them. It is precisely a suitably expanded interpretation of the individual right to a day in court, centered on the understanding of equal access to justice proposed throughout this essay, which shall explain concerns with democratic legitimacy in adjudicative procedures, and which motivates the introduction of group litigation in turns.

2. The theoretical and practical challenges in contemporary class action law and practice

In order to press the case for the existence of deep theoretical ambiguities in class action law and practice, and present in a clear way their concrete content, let us insist on well-known and classic taxonomies, and consider Mirjan Damaška's two, famous, interlocking distinctions on the ideologies of state authority in the legal process, and the corresponding forms of its administration.¹⁰ Historically, from modern times, and up until, at the very least, the end of the 20th Century, state authority in judicial administration in the West seems to display two basic orientations toward political ideology and practical legitimization. Public institutions involved in judicial administration either seem to have a reactive, passive, attitude toward the conflicts, which they are designed to solve; or, they seem to have an active, interventionist attitude. Judicial administration's job is, within the first ideological milieu (state authority as a passive problem-solver), to assure social peace. Its concrete activation is typically the job of private parties, who are the ultimate judges of its practical success. Conflicts are seen here as bipolar, and isolated, entities. There are two formal parties; they are one-shot players; they are autonomous individuals; and they are roughly equal in powers and social status. The idealized state of perfect administration is the achievement of global peace, through the harmonious coordination of private agreements and resolutions.¹¹

¹⁰ See MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

¹¹ Damaška's description of public institutions' reactive attitude toward legal conflicts is, indeed, very similar to Owen Fiss' characterization of, what he calls, the 'neighbors-stranger' model of dispute resolution, which we will closely comment on later on in this essay. Both descriptions are clearly inspired by Fuller's famous characterization of the proper role of adjudication in L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). In this essay, Fuller famously proposes a theory of adjudication derived from "one simple proposition, namely, that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys

Within the second ideological milieu (state authority as an active, interventionist force), judicial administration's job is to enforce substantive law.¹² Its activation is a public matter; the solutions it provides are public goods, and the state itself it's the ultimate judge of their practical success. The state here takes the lead, and imposes legal, pre-determined, solutions, which are legitimate, as long as they follow the dominant legal canon. The idealized state of perfect administration is the achievement of legal justice, through technical and specialized legal thinking.

General goals, and ideological orientations typically shape forms and techniques, but the relation is not univocal. Thus, Damaška's famously proposed a second, independent, distinction between two institutional formats, or complexes, which judicial administration took in the same period of time (that is, from the modern period, up until, at the very least, the end of the 20th Century).¹³ Judicial administration is either hierarchically, vertically, structured; or, it is coordinate, and horizontally structured. In

the meaning of that participation destroys the integrity of adjudication itself". Fuller then inferred that since, what he called, 'polycentric disputes' (namely, disputes whose resolution has implications for, and affects, the resolution of other disputes as well) are ill suited for the kind of participation which informs and contradistinguishes adjudication, then adjudication is ill suited for the resolution of polycentric disputes. The easy and intuitive conclusion is that Fuller is offering a definitive argument against the aggregation of individual claims in, for example, class action procedures, on account of the perils that such procedural mechanisms constitute for the integrity of adjudication. For a cogent criticism of such reading of Fuller's work, see R. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995). In any case, even if Fuller provided a convincing argument against the resolution of 'polycentric disputes' through adjudication in court, there remain to be considered two related point: 1) once we take into account, for example, the opportunity costs connected with bringing suits in a court of law, even the resolution of non 'polycentric disputes' has implications on other disputes – *not* on their *substantive* merits perhaps, but certainly on the availability of resources needed to resolve them – hence the need to reconsider the value of participation in a more ample way, even in non 'polycentric disputes'; 2) adjudication in courts of law (even of standard, non polycentric, disputes) might affect, and it typically does, the resolution of larger polycentric disputes, in a myriad of different ways, which might have little to do with the substantive content of the legal judgment that it is designed to produce – hence the need to evaluate what ordinary dispute processing may contribute to larger social processes of claim-making and social contestation, even when it does not provide a definitive resolution for the latter.

¹² MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986), at 38.

¹³ *Ibid.*

the first format (hierarchical structure), judges (as well as all other court officials), are, at base, public bureaucrats, with organized and linear careers, vertically integrated in a large, unified, organization. Private attorneys work a heavily regulated, but private, profession and organize in large associations, which typically replicate the hierarchical structure of public institutions. Hierarchical unity, professionalization, technical specialized training and a rigid separation between professionals and lay people, Damaška famously argued, lead to technical, formal, specialized, and highly coherent decision-making.

In the second format (coordinate, horizontal structure), court officials are not the prototypical public bureaucrats. “Ideally”, Damaška writes, “power is vested in amateurs who are called upon to perform authoritative functioned *ad hoc*, or for a limited time”.¹⁴ There is no ‘initiation’, and little formal training anyways, before someone gains the status of official, and recruitment is temporary. Temporary officials are then not rigidly distinguished from lay people and the judicial apparatus typically delegates some of its authoritative functions to private actors. No hierarchical unity, temporary employment, little specialized training, lead to, Damaška famously concluded, substantive, neither formal nor technical, and possibly contradictory between officials, decision-making.

The difficulty of (and, correspondingly, the interest in) group litigation lies in the fact that its introduction typically affects a re-arrangement of such double distinction, blurring both of its central axes. Group litigation involves more than two parties, who are not the ultimate judges of its practical success. Indeed, the point of group litigation, as we have seen, is to extend *some* of the effects of litigation beyond its formal parties, in order to increase the prospects of effective legal protection for otherwise excluded or

¹⁴ *Ibid*, at 40.

vulnerable individuals. And yet, such extension can be achieved *without* any direct public intervention, or activation. In contemporary US class actions, for example, it is the task of, at base, privately financed, private attorneys, to activate the relevant proceeding. In sum, group litigation calls for the integration of, at base, private actors, within clearly identifiable public functions (such as the achievement of efficiency gains in the design of litigation units).¹⁵ And yet, heavy public regulation of lawyers' services typically harms the prospects of group litigation, by tampering the way in which private attorneys can respond to the organizational and financial challenges the aggregation of claims presents (consider: regulation might affect the structure of the compensation lawyers can extract from their clients; the way in which they can advertise their offer of legal services; the way they can amass the financial capabilities that are required to support investment in group litigation, and so on...).¹⁶

Moreover, large bureaucracies, entrusted with pursuing legally sanctioned public goals, like the technical regulation of a specific social practice, or area of public concern

¹⁵ See M. Taruffo, Michele, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405 (2001); W. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND L. REV. 2129 (2004) (exploring the different 'senses' and 'mixes' of private and public interests, which underlie the phrase 'private attorney general', and which serve to identify its possible functions); M. Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, in II ACCESS TO JUSTICE: PROMISING INSTITUTIONS 769 (M. CAPPELLETTI & J. WEISNER EDS.) (1979); J. Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); M. Gilles, & G. Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012) (urging State Attorneys General to fill the 'enforcement gap' which, the authors claim, the Supreme Court created with, especially, AT&T Mobility v. Concepcion); C. Hodges, *Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress*, in MASS JUSTICE (J. STEELE AND W. VAN BOOM EDS) (2011); A. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939 (2011) (fleshing out and elaborating on two related dualities within discussions of class action law and practice: 1) the 'class' as an 'entity' or as a mere 'aggregation'; 2) the counsel as a public servant, or as a private entrepreneur);

¹⁶ For nuanced analysis of the several trade-offs which public regulation needs to consider, see C. Hodges, *US Class Actions: Promise and Reality*, in THE TRANSFORMATION OF ENFORCEMENT (H-W MICKLITZ AND A. WECHSLER EDS) (2016); J. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. LAW REV. 370 (2000) (advising the use of procedural mechanisms which guarantee 'exit' options as a remedy against unfaithful fiduciaries and proposes to view the 'class' as a aggregate of individuals, rather than as an 'entity'); J. Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987).

(like security against environmental harms, or against threats to public trust in specific markets of goods, or against systematic discrimination in employment) can be easily seen as functional equivalents of group litigation. What group litigation is supposed to be doing, that is, is precisely what such kinds of regulatory agencies are supposed to be doing as well, when they are created within state bureaucracies (like, traditionally, in much of Continental Europe).¹⁷ So, group litigation is an institutional alternative to the creation of regulatory agencies within traditional state bureaucracies, in response to the increasing complexities of harm prevention in contemporary capitalist (liberal) democracies.¹⁸

And yet the concrete management of group litigation clearly affects great transformations within the structure of judicial administration itself, for obvious reasons. Managing group litigation is obviously very different from managing individual litigation.¹⁹ What might work for the latter (for example: passive judges, with little

¹⁷ See C. Hodges, *Public and Private Enforcement: The Practical Implications for Policy Architecture*, in THE FOUNDATIONS OF EUROPEAN PRIVATE LAW (R. BROWNSWORD, H. MICKLITZ, L. NIGLIA & S. WEATHERILL EDS) (2011); C. Hodges, & N. Creutzfeldt, *Transformations in Public and Private Enforcement*, in THE TRANSFORMATION OF ENFORCEMENT (H-W MICKLITZ AND A. WECHSLER EDS) (2016); on the more general discussion of general cultural trends and orientations toward private or public enforcement of laws and regulations, see, for example, R. Marcus, 'American Exceptionalism' in *Goals for Civil Litigation*, in GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS 123 (ALAN UZELAC ED., 2014) (illustrating, with praise, the main features of American procedural exceptionalism as a conjunction of relaxed pleading, broad discovery, and jury trial, which, taken together, conspire for the unique role of civil litigation in American Government); and ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (chap. 1 especially).

¹⁸ S. Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AMERICAN JOURNAL OF POLITICAL SCIENCE 821 (2008); S. SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987), esp. at 277-86; D. Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

¹⁹ This is clear, for example, in Chayes' famous essay, which begins with the attribution of public functions to civil litigation, and ends by attributing a new role and functions to the Judge, see A. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). But there is much more: for an historically informed, but theoretically sensitive take on the issue, see, for example, R. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603 (2008) (identifying, and wrestling with, two contemporary dilemmas of class action law and practice: 1) "if the function of the class action today is indeed to operate in parallel with public regulation, then can that function achieve fruition without supplanting the institutional boundaries on regulatory power?"; 2) "how

administrative support by specialized functionaries), clearly won't do for the former. So, group litigation makes particular sense when a country lacks structured, and efficiently operating, state bureaucracies. And yet, when it is introduced, it tends to produce *other* kinds of public bureaucracies, which must then be integrated within state authority generally.

Empirical pressures on institutional and ideological taxonomies typically lead to theoretical ambiguities in practical thought and action. Group litigation is no exception.²⁰

to harness the capacity of the class action to facilitate privatized enforcement by way of settlements while, at the same, setting boundaries on the preclusive effect that such deals properly may exert on class members.”); see also RICHARD NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007) (conceiving the class action device as a form of private governance, and thus class action litigation, and its results, as a mode of administrative regulation); but see also, for a more descriptive approach, E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014); E. Fallon, J. Grabill & R. Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008) (both articles describing the large ‘administrative’ staff, which is necessary for multidistrict litigation to function).

²⁰ Crosscurrents of praise and blame are, indeed, very frequent within commentaries of the class action device, and have been so for a while. See, for example, A. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the Class Action Problem*, 92 HARV. L. REV. 664 (1979) (a classic and hugely famous essay defending the 1966 amendments to Rule 23 against the popular (and then growing) perception of a ‘class action problem’. Since its initial circulation in the late seventies, this essay had been so widely read and cited that it eventually codified a rather extensive (and somewhat distorted, as the essay itself cautioned) vocabulary of both praise and disdain, for and against, class action law and practice, with expressions such as ‘taking care of the smaller guy’, ‘legalized blackmail’, ‘sweetheart settlements’, and the like. At base, professor Miller concluded that “drastic revision of class action practice at this time, either by legislation or rulemaking, would be tantamount to attempting a cure by treating one symptom of an ailment rather than dealing with its underlying cause. Any attempt at modification now not only runs the risk of being an overreaction to the argumentative din of the past few years, but seems particularly ill timed because [...] class action practice under the existing rule appears to be stabilizing”). For a prime example of a heated debate between two opposing conceptions of the class action device, with each one expressing its fair share of controversial views on the latter, see B. Hay & D. Rosenberg, *“Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1390–93 (2000) (asserting that class actions are “without doubt the most controversial subject in the civil process today”, the article contains a reasoned critique of the perceived dangers of both so-called ‘sweetheart settlements’, in which class counsels allegedly “settle meritorious claims for far less that they should”, as well as so-called ‘blackmail settlements’, in which class counsels allegedly collect far more than they should) and M. Redish, & C. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753 (2007) (The article carefully traces the implications of different political theories of class actions from the point of view of liberalism, utilitarianism, communitarianism and civic republicanism, and argues that the class action device itself gives rise to a tension between collectivist and individualist political theories, thus concluding that it typically leads to ‘troubling results’ for the normative foundations of liberal democratic theory). Recent Supreme Courts decisions, like *Amchen*, *Wal-mart*, *Concepcion*, and *Comcast*, have not, to say the least, ‘settled’ all hard issues at law, nor have they provided solid grounds for reasonable agreements on policy choices, among different conceptions of the class action device. Just as a sample of the most controversial debates, see L. Mullenix, *Ending the Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L. J. 399 (2014) (The article contains an extremely useful ‘map’ for

For example, group litigation modifies the basic conditions of accessing, what I have called, the social technologies of claim-making within one country. But access to these technologies, in turn, contributes to the legitimacy of legal authority. Group litigation itself, then, is bound to raise doubts and cause uncertainties on the conditions of its legitimacy. Large bureaucracies entrusted with regulatory powers typically gain legitimacy (in contemporary market democracies), from political, and representative, institutions, who typically maintain some control on their operations. However, the nexus

all the different threads of academic narratives on, either defending or condemning, the class action device. The article further contends that, a popular rhetoric declaring the death of group litigation notwithstanding, Rule 23 class actions remain a “vital feature of the litigation landscape”. At the same time it argues that “Rule 23 is broken, dysfunctional, and in need of a root-and-branch reform”, and proposes “a return to a simpler class action rule limited to injunctive relief cases, with abandonment of the Rule 23(b)(3) damage class action”, and “enhanced recourse to ombudsmen or similar auspices to resolve [...] small-claims aggregate harms”); L. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511 (2013) (commenting on Redish’s argument on the (un)constitutionality of class action and, relatedly, on the latter’s apparent death, declared by those who disagree with Redish’s criticism); L. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, U. CHI. LEGAL F. 177 (2003) (commenting on the 2005 amendments to Rule 23, and pointing out that the Advisory Committee was able to reach consensus on such amendments by avoiding controversy, thus concluding that “In essence, any Rule 23 proposals that were innovative or that dealt with cutting edge class action issues were swiftly banished from the drafting table or consigned to rule-making limbo. [...] Consequently, we now have a Rule 23 revision that codifies long-established class action principles, that offends no one, and that does not deal with the truly pressing class action issues that have developed in the past thirty-six years” (citations omitted)); R. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (criticizing recent trends in Federal case law (such as requiring plaintiffs to prove substantial portions of their cases on the merits at class certification; or directly enforcing much stricter requirements for class certification itself; or upholding binding arbitration clauses that prohibit resolution of disputes on a class-wide basis), the article argues that courts have significantly undermined the compensation, deterrence, and efficiency functions of the class action device, and calls for a more balanced approach to the evaluation of its costs and benefits); R. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097 (2013) (critically commenting on the most recent trends in class action doctrine, and arguing, in particular, that the significant restraints which the Supreme Court imposed on class actions in *Amchem* (by adopting a strong cohesion requirement) and in *Wal-mart* (by excluding individualized monetary compensation from (b)(2) class actions) are *not* “based on a clear understanding of what fairness to absentees requires or how the individual day-in-court right can be reconciled with representative litigation. As a result, the Court’s decisions are poorly reasoned and its restrictions inadequately justified”); M. Gilles & G. Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012) (urging State Attorneys General to fill the ‘enforcement gap’ which, the authors claim, the Supreme Court created with, especially, *AT&T Mobility v. Concepcion*); G. Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24 (2012); J. Sternlight, *Tsunami. AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012); A. Trask, *Reactions to Wal-Mart v. Dukes: Litigation Strategy and Legal Change*, 62 DE PAUL L. REV. 791 (2013) (offering a less pessimistic view of the future of class action); M. Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005);

between the concrete agents of group litigation (private attorneys, private associations, unions, judges, administrative court-personnel, and so on) and political institutions who enjoy democratic legitimacy is far more intricate, and difficult to reconstruct. But if group litigation is to be the functional equivalent of regulatory agencies, some kind of functional equivalent for the relation between state bureaucracies and political institutions must be found as well.

3. External v. internal views of the class; process based v. outcome based approaches to procedural legitimacy; judicial doctrines on the legality of group litigation.

Robert Bone has provided perhaps the most comprehensive and systematic hypothesis on the connections between doctrinal rationalizations of, and practical justifications for, US class action's law and practice.²¹ So comprehensive and systematic that it can be safely extended to many more jurisdictions and legal cultures.

There are two major ways, Bone argues, to re-construe doctrinal rationalizations and political theories of class actions. There are two ways, or models, that is, in which one can organize one's thoughts about the different historical threads of judicial and scholarly interpretations, and moral and political theories, about class action law and practice.

To illustrate them, Bone proposes three interconnected distinctions. First, judicial opinions and scholarly reconstructions typically take one or another view of the relevant 'class', or 'group'. Some conceive the 'class' internally; that is, according to such view, the 'class' does *not* preexist the litigation at hand, nor does it survive it. The 'class' is a

²¹ See, especially, R. Bone, *The Misguided Search for Class Unity*, in 82 GEORGE WASHINGTON LAW REVIEW 651 (2014).

legal construction, whose value is entirely instrumental to the efficient legal protection of its members.²²

Others conceive the ‘class’ externally; that is, the class is something, which preexists the litigation at hand, and will survive it. Its legal construction should thus directly track its independent recognition in social and political practice.²³

Second, scholarly reconstructions and political theories typically adopt one or another approach to the practical justification of class action law and practice. Some follow an outcome-based approach to political justification: class actions are justified as long as their procedures promote an outcome of a certain quality. And outcome quality is typically understood as a function of accurate decision-making (fit between substantive law and the merits of specific decisions) and of the costs of procedure.²⁴ As Bone himself puts it: “adjudicative outcomes should fit the entitlements that substantive law creates”.

²²R. Bone, *The Misguided Search for Class Unity*, in 82 GEORGE WASHINGTON LAW REVIEW 651 (2014); for clear illustrations see, for example, Coffee, John C. Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. LAW REV. 370 (2000) (criticizing the understanding of ‘class cohesion’ as the essential rationale which legitimizes representative litigation, it advises the use of procedural mechanisms which guarantee ‘exit’ options as a remedy against unfaithful fiduciaries and proposes to view the ‘class’ as an aggregate of individuals, rather than as an ‘entity’); D. Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L. J. 561 (1987);

²³ R. Bone, *The Misguided Search for Class Unity*, in 82 GEORGE WASHINGTON LAW REVIEW 651 (2014); D. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998) (describing “two models for analyzing and evaluating class actions: 1) an ‘aggregation’ model that recognizes the value of joining forces in a plaintiff class but also attempts to retain as much individual autonomy and control as possible in the prosecution of the action, and 2) an ‘entity’ model, which regards the class itself as the litigant and the client”, the essay argues for the second one, and carefully traces its implications for class action law and practice. These include “the grounds for certifying all or part of a dispute as appropriate for class treatment; the scope of the right to notice and to opt out of the class; questions of the relations among the class, its members, and the attorneys representing the class; the proper role of the judge; and the applicable rules of substantive law”, and, on an institutional level, “the allocation of authority between the federal government and the states, [...] the choice between adjudication and rulemaking as techniques of law declaration, and [...] the choice between courts and legislatures as appropriate rule-makers”).

²⁴ R. Bone, *The Misguided Search for Class Unity*, in 82 GEORGE WASHINGTON LAW REVIEW 651 (2014); D. Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L. J. 561 (1987); most clearly, see Judge Posner’s opinion in *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012) (“predominance is a question of efficiency. [...] Is it more efficient, in terms both of economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials? A class action is the more efficient procedure for determining

Other political theories follow a process-based approach, according to which outcomes alone do not determine everything that matters in procedures.²⁵ Procedures are not *just* instrumentally valuable. They are inherently valuable as well, since they confer legitimacy to the outcomes they produce. In the most common versions of process-based approaches to political justification, procedures are legitimate as long as they respect the autonomy and dignity of its participants, by protecting the latter's control over the litigation they are parties of.

Third, some political theories conceive participation in legal proceedings as merely instrumentally valuable: participation is valuable as long as it is conducive to valuable outcomes.²⁶ Other political theories conceive participation in legal proceedings as intrinsically valuable. There is something about participating in legal proceedings, and participating *in the right way* (that is, most typically, having the right kind of control over the proceedings themselves), which contributes to the legitimacy and acceptability of their outcomes, regardless of the latter's substantive content.

liability and damages in a case such as this, involving a defect that may have imposed costs on tens of thousands of consumers yet not a cost to any one of them large enough to justify the expense of an individual suit. ”), vacated and remanded, 133 S. Ct. 2768 (2013), reinstated, 727 F.3d 796 (7th Cir. 2013), and in *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364 (7th Cir. 2012) (proposing an outcome-based reading of *Dukes v. Wal-Mart Stores*).

²⁵ For sophisticated formulations of this view in procedural scholarship more generally, see L. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 10–7, AT 666–67 (2ND ED. 1988); JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 189–99 (1985); Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

²⁶ For an illustration, see R. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, U. CHI. LEGAL F. 475 (2003), which begins by posing two classic ‘instrumentalist’ questions (and goes on answering them from a clearly instrumental perspective on procedural law and the value of participation in legal proceedings): who should hold the cause of action when someone's rights are invaded? And, relatedly, why should it be the holder of the right, which has been invaded? Interestingly, Epstein ends up arguing many of the same conclusions (noting the substantive distortions affected by the class action device), which Redish argues as well, albeit starting from the almost exactly opposite view of procedural law. See also D. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998) (expressing skepticism about the concrete practical value of individual participation); L. Mullenix, *Competing values: preserving litigant autonomy in an age of collective redress*, 64 DEPAUL L. REV. 601 (2014) (elaborating on the value of individual participation, and critically commenting on much of contemporary procedural scholarship on the subject).

Let us now connect the different prongs of these three distinctions and construe the two ways in which, according to Bone, one can organize one's thoughts about US class action law and practice. In one of these, the relevant doctrinal or legislative concepts, like adequacy of representation, predominance, and the individual right to a day in court, which determine, or limit, the legality of class actions, all rely on an internal view of the class. That is, the class is seen as the collection of individuals, which most efficiently identify the persons to whom the preclusions produced in one case should extend. Typically, these approaches follow an outcome-based approach to political justification, according to which adequacy of representation, predominance and the individual right to a day in court are all evaluated in terms of their impact on the outcome that they produce (i.e., the most efficient solutions to the legal controversies at hand). Participation in legal proceeding is then understood to be merely instrumentally valuable.

According to the other way of conceiving class action law and practice, the relevant doctrinal or legislative concepts all rely on an external view of the class. That is, the class is a collection of individuals, which preexists and survives the litigation at hand. Typically, these approaches follow a process-based approach to political justification, according to which adequacy of representation, predominance and the individual right to a day in court are all evaluated in terms of whether their normative content actually respects individual autonomy and dignity in legal procedures. Participation in legal proceeding is then understood to be intrinsically valuable.²⁷

²⁷ L. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); MARTIN REDISH,, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009); M. Redish, & N. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573 (2007).

Quite reasonably, Bone infers from all of this that, most commonly, the doctrinal rationalizations, scholarly reconstructions and political justifications which appear most stable, and least subject to internal contradictions and inconsistencies, *either* define the class internally, and then follow an outcome based approach. *Or*, they take an external view of the class, and then follow a process-based approach. If we begin by saying that all which really matters are outcomes and outcomes alone and then go on and try to understand everything else about legal procedures in terms of their instrumentality to achieving particular outcomes, it is relatively easy to conclude that the very definition of the class too, for example, is politically relevant only relatively to which consequences defining the class in one way or another might have on the outcomes of legal procedures. What the class should be, as well as what it should mean, for one, to participate effectively in a legal proceeding, should then be resolved by cost-benefit analysis of the probable outcomes of one form or another of legal adjudication.

Conversely, if we begin by understanding one form of procedure (say, adversarial, individual, litigation of the relevant issues and claims) to be essential for legitimacy concerns (this is the *only* way in which procedures can legitimately bind those who are affected by them), we should then conclude that the identification of the right parties to legal proceedings should directly track the relevant social actor, whose dignity and autonomy the state should protect. Being a party to a legal proceeding is not just instrumentally valuable (relative, that is, to the increases in quality of the outcomes of legal proceedings), but it has intrinsic worth as well, since it contributes to the legitimacy of adjudication as a whole. But this means, also, that a process-based approach typically takes an external view of the class.

4. The right to a day in court argument. Its structure, content, practical consequences and limits.

So, how can one locate the right to a day in court argument within Bone's framework? Generally speaking, the right to a day in court argument views procedural due process "as a means of furthering and vindicating foundational democratic values".²⁸ At base, the argument seeks to establish a foundational analogy between participation in legal proceedings, and participation in the political process:

[A]s the government may not impose on a democratic society leaders who are unwanted by the electorate on the grounds that the electorate does not know what is good for it, individuals or groups should not be required to trust in or defer to the competence, resources, or enthusiasm of others in the protection or advancement of their chosen interest.²⁹

Such analogy then leads to an exacting formulation of the demands of procedural due process, "The adversary system and the day-in-court ideal each constitute an extension and further evidence of our commitment to liberal democratic theory".³⁰

Analytically, the argument begins by distinguishing between, what it calls, process-based autonomy and substantive autonomy.

Substantive autonomy relates to the ability to conduct our lives in the way we choose – to own guns, to use marijuana, to cross the street. Substantive autonomy seeks to prevent government intrusion into our daily lives. In contrast, the ability to make choices about the way in which we interact with the political system, or what can be labeled process-based autonomy, seeks to assure that when the government intrudes on our lives it is doing so in a manner that has been democratically authorized. In this way, process-based

²⁸ See M. Redish & C. Berlow, *The Class Action as Political Theory*, 85 GEORGE WASHINGTON UNIVERSITY LAW REVIEW 753 (2007).

²⁹ See M. Redish & N. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573 (2007)

³⁰ M. Redish, & W. Katt, *Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877 (2009).

autonomy is agnostic as to a normative commitment to any particular political policy; rather, process-based autonomy upholds the mechanisms without which we could not democratically express our personal policy preferences.³¹

The argument then conceives participation in legal proceedings as intrinsically valuable, since it “is a means by which the individual asserts his dignity and worth, both necessary conditions to a viable liberal democracy”.³² Viewed from the other way around, this means that liberal democracies should be committed to recognize to individuals “the right to choose how to fashion [their] own representation and to participate in the process as [they] see[...] fit, within the prescribed adjudicatory framework”³³; liberal democracy would then seem to commit us, according to the argument, to “unfettered individual discretion in controlling litigation”.³⁴

This means, also, that the right to a day in court argument conceives individual litigation as the standard, or central and paradigmatic, way of delivering justice in a community of equals, and then understands the justification of group litigation as an exceptional case in which individual litigation fails to perform its function in protecting process-based autonomy. This thought is well captured by the two basic political principles, which, the argument proposes, should provide the standard model for the justification of group litigation.

The first principle states that

at least as a *prima facie* matter, all individuals are entitled to full control over the process-based choices made while pursuing their individual claims, and that—again, at least as a

³¹ M. Redish, & W. Katt, *Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877 (2009).

³² *Ibid.*

³³ *Ibid.*

³⁴ See M. Redish & C. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753 (2007).

prima facie matter—control of those choices may not be taken away without the individual's unambiguous expression of consent.³⁵

So, at least *prima facie*, parties are granted unfettered discretion, and full personal control over litigation choices, *and* not even implicit consent works, to legitimize group litigation: we need one 'unambiguous expression of consent'.

The second principle justifies the limitations that group litigation places on an individual's process-based autonomy right

if, and only if, treating him as part of a collective litigating unit would ultimately advance his individual interests in a manner he is incapable of achieving as an individual litigant.³⁶

This restricts the desirability (and, most importantly, the legitimacy) of group litigation to cases in which parties have voluntarily agreed to join group litigation itself, and thus enter into agreements among each other with the explicit purpose of limiting their process-based autonomy; or, to cases of effective inability to vindicate individual claims, in absence of such a process.

To sum up, the right to a day in court argument defines the class externally (a class is a collection of individuals who have agreed to pursue a claim together), it follows a process-based approach, and conceives participation in legal proceedings as intrinsically valuable.

So, most concretely, the right to a day in court argument has a number of clearly identifiable practical consequences. For one thing, it generally excludes the legitimacy of mandatory classes.

³⁵ *Ibid.*

³⁶ *Ibid.*

The notion that a class representative could require another individual to resort to the judicial process for redress of a wrong inflicted against the two of them, and limit or remove that individual's ability to control the litigation, serves as an egregious example of an unwarranted restriction of process-based autonomy.³⁷

Also, and consequently, the right to a day in court would typically favor opt-in, as opposed to opt-out, mechanisms for class or group aggregation.³⁸ People should be generally left free to actively choose to join group litigation, rather than being tricked into participating, by public reliance on their ignorance or lack of interest. So perhaps implicit consent *could* work (not *prima facie*, however: there must be an unambiguous expression of consent) to legitimize group litigation. But the problem is that, *at present conditions*, it is a bad assumption to believe that silence is the product of implicit consent, rather than of unawareness of opportunities to express one's preferences.

Now, we have already discussed, in several different places throughout this essay, many arguments, which advise against the particular reading, centered on a strong interpretation of the value of autonomy, that the right to a day in court argument makes of a process-based approach to political justification. For one thing, we have noticed, if autonomy is what triggers, as a matter of justice, the recognition of the relevant legal protections relating to participation in legal proceeding, we are left with no discerning criterion in cases in which the relevant being is *not* (because it cannot be, either temporarily or permanently) an autonomous agent. This means that we might have to exclude (albeit for very different reasons), for example, children, people with (cognitive) disabilities, prison inmates and so on. In all of these cases, we should still demand that due process protects real possibilities of communicative (and, thus, meaningful)

³⁷ *Ibid.*

³⁸ *Ibid.*

interactions within legal proceedings, even when we doubt that the holder of the relative right is a full and autonomous agent.

Indeed, the distinction itself between autonomous agents, and dependent and non autonomous ones, often times seems to be based on a faulty, or, in any case, non perspicuous and short-sighted, understanding of what an autonomous agent can actually do *by himself* within the legal process. If left to one's own devices, anyone is equally vulnerable to anyone else when the law mobilizes against one. Personal control over litigation is *personal* in the similar, very limited, sense, in which in standard conditions on earth (say, between 0 and 5000 meters above water, in open air) breathing is just a matter of well functioning lungs. But standard conditions have no necessary normative implications, especially when they are not the result of physical regularities (i.e.: humans cannot extract oxygen from water through their lungs, and thus cannot live under water), but are the result of social choices and design instead (i.e.: all official legal documents are written in the language of a dominant group, which is unknown to an oppressed minority).

We have also seen that taking the protection of autonomy as the paramount goal of judicial administration gives one too few grounds to introduce reasonable limitations to the relevant rights and privileges in question. Abuse of procedural rights by claim-makers might not threaten other claimants' opportunities to control their own dispute. To be sure, if public institutions waste public resources in handling trivial cases, they are left with fewer resources to invest on handling important and valuable ones, thus compromising the effective legal protection of valuable goods and interests. But no amount of imprudent spending and public waste in one case can harm parties' 'unfettered

discretion’ to choose how to litigate their claims in *other* cases. So, if we shall impose limits to the imprudent waste of procedural resources, we shall look for a firmer base than mere ‘unfettered discretion’ and personal control in litigation choices.

But we can now add a new one, which is specific to class action law and practice. The right to a day in court argument, when understood from the point of view of the protection of process-based autonomy, can hardly be raised, without inconsistency, by commentators who approve of jurisdictions (like most jurisdictions in Continental Europe) which impose a legally sanctioned duty to be represented by a lawyer, whenever one wishes to appear as a formal party to a judicial proceeding. If process-based autonomy means that one has a meta-right to make autonomous decisions on how to fashion one’s own representation and to participate in litigation as one sees fit, then it should also trigger a right to self-representation as well. If it does not (as it happens in many jurisdictions in Continental Europe), it could not, at the same time, possibly trigger any limitation to the extension of preclusive effects through group litigation.

5. An alternative argument: the interpretation of the principles of equal access to justice in group litigation

So, does the approach to equal access to justice proposed here fare any better, and take us any farther?

This subsection begins by explaining how the three principles of equal access to justice provide a general case for the introduction of forms of group litigation – that is, they provide a general case for considering the introduction of forms of group litigation as the institutional specification and entrenchment of, what we have called, the duty to, at

times and provisionally, pause, cool down and listen and, as such, as a means to protect democratic equality in access to justice.

In order to give normative specificity and practical bite to such general case, the section then moves to discussing the other general approaches, which Redish identifies and then dismisses, which provide nuanced defenses of the class action device, finding both similarities as well as differences.

Finally, the subsection traces the practical implications of this theoretical posturing by directly commenting on some of the most radical of Redish's suggestions for US class action law and practice – in particular, his skepticism about mandatory classes, and his general preference for opt-in, as opposed to opt-out, collective procedures.

5.1 On how to justify group litigation

The three principles of democratic equality, which inform the point of equal access to justice, provide very common and reliable justifications of group litigation.

One reason for being worried when the structure of due process costs systematically precludes the activation of legal proceedings by their beneficiaries, and when the benefits of judicial decisions do not reach all of their potential beneficiaries, is precisely that we are worried about unequal social relations, and should expect public authorities to do something to prevent their legal entrenchment. For example, when the frequent response of a group of similarly situated plaintiffs to a common legal problem they all have with the *same* defendant is 'doing nothing', because the costs of claim-making through the law make it irrational (or heroic, or foolhardy) to vindicate one's

rights or interests, strategic defendants can exploit the procedural obstacles that appear in the path of active plaintiffs, as they attempt to vindicate their interests and rights, and then entrench their privileged status by exploiting the inefficiencies of judicial administration. The class action device serves to protect equality in social relations by shifting some of the costs (and the risks) of inaction by some, away from active plaintiffs, to defendants.

Grouping claims together serves epistemic ends as well. Indeed, one of the points of using representative litigation is precisely to make economically viable otherwise too expensive investments in proof-taking and fact-gathering. For example, one of Rosenberg's most famous and influential arguments, justifying mass tort litigation, stems precisely from the understanding that, in mass torts, defendants typically enjoy institutional advantages in individual litigation, which allow them to litigate "what is the same case over and over again, while each plaintiff is forced to start from scratch". Class actions, in this model, are meant to counterbalance the advantages in case preparation, which accrue to defendants in individual adjudication. Moreover, and most generally, structured communicative interactions among people who have suffered similar wrongs might favor mutual learning and practical networking in argumentative strategies, thus increasing the prospects for the successful construction of effective legal claims.

Finally, consider the expressive harms of allowing the costs of due process to systematically preclude the activation of legal proceedings by its beneficiaries, or of allowing the benefits of judicial decisions to fail to reach all of its potential beneficiaries. On one hand, the state seeks legitimacy by demanding compliance with one's duties, in exchange of protection for a list of basic rights. On the other, it conditions the

performance of its part in the bargain on some contingent feature of the structure and content of the interests and rights that it is under a duty to protect.

This invites cynicism about the law among the privileged, as well as among the excluded, with the former correctly believing that their interests and rights are judged to be more important and salient by the legal system, and unreasonably inferring that this is *not* a violation of their duties *vis-a-vis* the latter. The excluded are instead invited to believe (correctly) that currently valid legal rules do *not* protect them as they promise to, and then to infer (unreasonably) that *no* law will *ever* protect them as it should promise to.

Operationally, the approach advises then to begin by identifying a group of claims, tied to the protection of one or more fundamental capabilities, whose holders individually lack the combined capabilities, which are required to litigate effectively, thus enabling defendants to exploit the inefficiencies of judicial administration. Then, the approach advises to compare the combined capabilities of each participant in group litigation, with the combined capabilities that each would enjoy in individual litigation, and make sure that reductions (above the threshold) of the latter for some parties, are justified by increases (from below the threshold), of the combined capabilities of other parties.

At first blush, this might look a lot like Rosenberg's welfarist/consequentialist justification of the class action device.³⁹ We justify the introduction of group litigation as long as its use increases the legal system's effectiveness in protecting its subjects against wrongful harms and injuries. But there are relevant differences as well.

³⁹ D. Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849 (1984)

Let us begin by noticing that the approach proposed here gives much more value to establishing a close connection between the individual whose rights or interests have been violated and the person who is entitled to sue for their vindication. In fact, a welfarist/consequentialist approach to the class action device could easily *deny* that there is any value at all in establishing a close connection between these subjects, as long as the person who is entitled to sue can be reasonably expected to vindicate the individual's rights and interests in a more effective way, than the one who has actually suffered the wrong. But that's because a welfarist/consequentialist approach typically takes deterrence (both general and special) to be the paramount goal of a reasonable legal system, and the production of litigation outcomes, which cost-effectively protect the deterrent functions of substantive law, as the paramount goal of procedural law.

The approach proposed here takes deterrence to fit in a much larger system of reasonable goals and objectives instead. These goals and objectives include, for example, the enactment of institutional reform, against legally wrongful but entrenched social practices. Relatedly, the approach takes a much wider view of the instrumentalities of procedural law generally, and equal access to justice particularly, as it includes the epistemic, as well as expressive, functions that litigation can perform in a democratic community of equals.

So, whereas Rosenberg advises to compare group litigation with individual litigation, analyzing the costs and benefits of each in deterring wrongful behavior, the approach proposed here begins by noticing the failures of individual litigation in protecting social equality, in nurturing the epistemic powers of public institutions and in expressing a democratic culture, and then proceeds by justifying the introduction of

forms of group litigation, as long as the latter can be shown to be effective in curing such failures of individual litigation. Since the protection of social equality, the nurturing of the epistemic powers of public institutions, as well as the expression of a democratic culture, are taken to be conditions for the legitimacy itself of a legal system, the introduction of forms of group litigation is then understood as a requirement for the democratic legitimacy of a legal system.

Correspondingly, whereas a welfarist/consequentialist approach would advise to design ‘litigation units’ by establishing the most efficient vehicle for deterring wrongful behavior by defendants, the approach proposed here advises to design ‘litigation units’ by identifying the specific group of people whose rights and interests individual litigation fails to protect, in a way which threatens their social equality, the epistemic capacity of public institutions to adjudicate their claims, and the latter’s ability to genuinely express a democratic culture in the resolution of social conflicts.

This shall take us very close to Shapiro’s external view of the class, since the legal construction of the relevant class is *not* understood as the mere product of judicial or legislative design, but should track an independent identification in political and social practice generally.⁴⁰ But Shapiro takes this point much further than the approach proposed here should be willing to go, as he goes as far as identifying the class as an independent, ‘organic’, entity, with specifiable and discreet rights and interests, over and against the individual rights and interests of its members. The approach proposed here should not go this far. Rather, it merely identifies a group of claimants, whose rights and interests cannot be effectively vindicated through individual litigation (in the senses specified above), and, thus, who need to cooperate as a group in order to do so. Then, the

⁴⁰ D. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

approach should specify the rights and duties that each individual has, in light of being a member of such group, and which shall ensure, first, the effectiveness of their cooperation in claim-making, and, second, that such cooperation actually respects the three principles of democratic equality which justifies the introduction of group litigation itself.

In sum, whereas Shapiro proposes to identify the class by identifying, also, an abstract set of rights and interests which could be attributed to it, and then justify restrictions to the rights and interests of class members in light of the rights and interests of such ‘organic entity’, the approach proposed here begins with the identification of the individuals’ rights and interests, and the specific problems that inhibit their effective vindication through individual litigation. Then, the approach proceeds by specifying the rights and duties that the legal system should impose on class members, as a response to the coordination challenges that such individuals have to face in order to vindicate their rights.

Clearly, the approach proposed here attributes public functions to the class action device. The latter is understood as a means for the enforcement of public values, which individual litigation fails to protect. As such, the approach comes particularly close to Owen Fiss’ public action model for the class action.⁴¹ According to Fiss, class actions are best understood as institutional devices, which allow private suits to have beneficial effects in vindicating the public interest. Their concrete regulation should thus make economically viable causes of action, which would be economically inefficient to pursue through individual litigation. Class actions are a form of ‘interest representation’, where private parties pursue the furthering of public interests, which individual litigation fails to

⁴¹ O. FISS, *The Political Theory of the Class Action*, in *THE LAW AS IT COULD BE* (2003), at 122

protect. So far then, Fiss' public action model is perfectly compatible with the approach proposed here, as they both justify the class action device in light of the failures of individual litigation, and, thus, as a tool to steer the adjudication of private suits toward the realization of beneficial social consequences.

But there are important differences as well, especially in the ways in which the two approaches resolve the tensions between the pursuance of the public interest through private suits and the protection of an individual's right to a day in court. First, whereas Fiss leaves the definition of the public interest which the class action device should be designed to protect rather uncertain and unclear, the approach proposed here states explicitly that the class action device should be designed to protect the public interest in democratic equality in the adjudication of claims, as one of the essential goals which any legal system should aim at realizing as a condition for its own legitimacy.

Second, and consequently, Fiss justifies limitations to an individual's right to a day in court by appealing to a notion of 'interest representation', which is, he claims, congenial to collective proceedings, and which should supersede the notion of individual representation (aimed at manifesting a "public commitment to the dignity and worth of the individual"), which is more appropriate whenever "particular individuals have been singled out", like in criminal or administrative proceedings. On the contrary, the approach proposed here justifies the imposition of limits to an individual's right to a day in court precisely by pointing to the failures of individual litigation in providing adequate representation to the private interests and rights at dispute and, thus, justifies the imposition of duties to class members, as long as cooperation with other claim-makers provides one with a more effective representation at trial.

Third, and finally, whereas Fiss conceives individual participation in a class action as merely instrumentally valuable, the approach proposed here conceives participation in legal proceedings generally as not just *instrumentally* valuable to the achievement of particular final outcomes (i.e.: how costly it is to achieve a specified level of accurate decision-making) in adjudicative proceedings, and yet as having extrinsic, *not* intrinsic worth. Our reasons for caring about participation in legal proceedings are not fully represented by cost-benefit analysis of outcomes alone. They include, for example, both epistemic as well as expressive considerations, which enlarge the instrumentalities of participation well beyond the consideration of the final outcomes of adjudicative procedures. And yet participation is not intrinsically valuable. Rather, its value depends on the value a community of equals should give to democratic cooperation as a whole. That is, democratic equality values participation in legal proceedings *as a way of* valuing successful cooperation among equals. Recall: the relevant social function, which the institutional entrenchment of equal access to justice should be designed to protect, is the ability to participate in claim-making and conflict resolution (that is, the ability to disagree), without disrupting social cooperation, but re-affirming the values, which support peaceful social cooperation among equals.

More specifically, according to the analytical framework developed throughout this essay, the regulation of participation in legal proceedings should reflect parts of one's institutional duties, rights and privileges, stemming from the pre-political duty to, at times and provisionally, pause, cool down and listen. And this should be so in at least three senses that we have explored already: first, the institutional entrenchment of the duty to, at times and provisionally, pause, cool down, and listen, guards against the entrenchment

of unequal social relations; second, it protects and nurtures social inquiry on legal matters, by exploiting the epistemic virtues of diverse and plural perspectives on issues of common concern; and, third, it expresses a democratic culture in conflict-resolution, by directing the institutional machinery of public adjudication to solving social conflicts in a way which re-affirms the values of democratic cooperation among equals.

So, participation in legal proceedings is, indeed, instrumentally valuable to the production of valuable social outcomes. But the enlargement and enrichment of its instrumentalities as well as, relatedly, of the relevant social outcomes it contributes to produce, jointly guarantee that, with respect to the specific outcomes of public adjudication (how accurate and costly they are), it is *non*-instrumentally valuable as well, without having intrinsic worth.

5.2. Mandatory classes; opt-in or opt-out aggregation mechanisms

Let us now trace the concrete practical implications of this general theoretical posturing. As we have already seen and commented on, a CA generally prefers to leave people choice over the actual exercise of their (institutionally protected) opportunities for action and thought – the aim of public policy, as we have repeated many times, should be to protect capabilities and *not* to push people into specific functionings.

This general observation alone should explain why a CA would generally worry about the extensive use of mandatory classes, even when they are used as a tool for the institutional protection of valuable goods and interests. But there are exceptions, both to the general principle of choosing to focus on capabilities over functioning as a target of institutional intervention, as well as to its reasonable application in the field of group

litigation. In fact, Redish himself gives us a good rationale for introducing one exception. Redish argues that Rule 23(b)(1)(A) appropriately prescribes mandatory classes, because, in these cases, “individual suits could give rise to conflicting obligations for a litigant opposing the class”.⁴²

Imposing anomalous obligations on individual defendants forces them to exercise their autonomy so that they must ignore one of the obligations placed upon them. The severe restriction on the defendant’s autonomy would seem to justify restriction of the autonomy of the various potential plaintiffs in this context

But we can easily add another one (which Redish explicitly contests): so-called ‘limited fund’ classes, which Rule (b)(1)(B), correctly, makes mandatory. When it is impossible for every member of the class to collect their complete damage through individual litigation, the protection of equality in the space of capabilities (as opposed to equality in formal powers) of claimants, together with the commitment to the protection of a threshold level of combined capabilities for all, justify mandatory classes.

But what about (b)(2) classes? In *Wal-mart*, Justice Scalia called it “self-evident” that in (b)(2) classes, class issues predominate over individual ones, and class treatment is a superior method for adjudicating the dispute. That is why, he argues, the procedural protections of (b)(3) classes (such as mandatory notice, and the right to opt-out) are absent in (b)(2) ones. Self-evidence is a concept, which is characteristically very difficult to pin down, however. In fact, Redish himself doesn’t take it to be self evident at all that (b)(2) classes should be mandatory classes, and with good reasons. He is certainly right that (b)(2) classes have been traditionally associated with civil rights plaintiffs, seeking to

⁴² M. Redish & C. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753 (2007), at 807, 808.

pursue 'idealistic ends'. And he is certainly right to consider it conceivable that some individual class members may not agree with the idealistic ends being pursued. Indeed, quite apart from abstract 'idealism', there are certainly very different conceivable ideals one could reasonably wish to pursue, so Redish is certainly right in considering the ability of individual class members to register their dissent from the concrete ends being pursued as a valuable function, and he is right in viewing mandatory classes as a direct threat to the latter.

One way to think through these difficult problems is to consider the exact content of the duties, which are imposed on the parties (both named and absent, defendants and plaintiffs), by making the class action device mandatory for specific types of cases and claims.

First, and most directly, mandatory classes impose duties on absent class members: they have to stick with the outcome of the case – that is, absent class members are precluded from re-litigating the issues which have been decided in their absence, without having had a chance to influence the litigation choices of the named plaintiffs. Notice that these are not just duties to pause, cool down, and listen, but rather add something more. Absent class members in mandatory classes do not simply have to listen to what the named plaintiffs are proposing to claim on behalf of everyone else, and then decide on their own what could best serve their interests, they also have to accept litigation outcomes which they might not have had a chance to influence, or to contribute to, or even to get out from. This seems unfair, as it prevents absent class members from having their say in the adjudication of their rights and interests.

These are not the only duties that we impose through mandatory classes, however. We are also imposing duties on the named plaintiffs to consider (and to consider as relevant for the determination of their own claims) the specific position of absent class members as well. In order to make their own claims, and have formal standing in a court of law, named plaintiffs have to bring their action as a class action.

Notice that this is much closer to an appropriate institutional specification of the duty to, at times and provisionally, pause, cool down and listen. Named plaintiffs are *not* simply disbarred from doing what they wish. Rather, they are obliged to take into account the position of absent class members as they do what they think would best serve their own interests. What's more, the imposition of such duty on the named plaintiffs seems perfectly compatible with granting opt-out opportunities, together with notice and a chance for intervening, to absent class members.

Notice, furthermore, that imposing the duty to bring action as a class action, and thus, to listen to what other similarly situated individuals might wish to claim, while determining the specific content of one's own claim, makes particular sense whenever there are, alongside a claim, which is common for all class members, a series of individualized claims, which each class members individually have – for example, a common claim of sex discrimination against the same employer, alongside a series of individualized claims for back pay (like in *Dukes v. Wal-mart*).

To be sure, the aggregation of non-homogenous claims, alongside common ones, creates an opportunity, for the named plaintiffs (and their counsels) for self-dealing and strategic bargaining, possibly exchanging the vigorous pursuance of the claim, which is common to all class members, for larger pay-offs in the individualized recoveries for the

named plaintiffs (and their counsels). But such opportunity doesn't vanish, by abolishing the class action device altogether – it simply becomes invisible to the public eye. So, contrary to how the US Supreme Court reasoned in *Wal-mart*, it is precisely in these cases that the class action device makes particular sense. In these cases, we should want the aggregation of claims “to take a weak signal [i.e.: *one* individual claim of sex discrimination by one employer] and amplify it”⁴³ by aggregating claims of similarly situated individuals, on the basis, for example, of a credible theory about a corporate practice of sex discrimination against women employees generally. Requiring notice to, as well as opt-out opportunities for, absent class members, should help to put pressure on named plaintiffs (and their counsels) to take in due consideration the interests of absent class members.

What about (b)(3) classes then, for which Rule 23 requires notice to, and opt-out opportunities for, absent class members. Again, let us consider the specific content of the duties that opt-out classes, as opposed to opt-in ones, impose on the parties (both named, or absent, defendants or plaintiffs). In opt-in classes, the risks of inaction by absent class members are allocated to the named plaintiffs. If absent class members are unaware of the class action, or not persuaded to join it, or deem it too costly or useless, the class action simply cannot proceed. At first blush, this makes a lot of sense. Named plaintiffs are the ones who are conscientiously pursuing a benefit, so they are the ones who should pay the price for failing to persuade others to join in their action. And, moreover, the approach proposed here, as we have seen, should aim at protecting capabilities (a real

⁴³ I adapt this phrase from a recurrent one in R. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, in U. CHICAGO LEGAL FORUM 453 (2003).

possibility of choosing to participate in the class action), and not at pushing people into a particular functioning (actually participating in a class action).

But recall, one of the points of group litigation from the point of view of equal access to justice, is precisely to redistribute the burdens of litigation, when the design of individual litigation *de-facto* allows powerful defendants to exploit such burdens in a strategic way, by-passing the substantive content of valid laws. Indeed, opt-out procedures offer a rather straightforward way to affect such redistribution. If the class action proposed inadmissibly pursues an unfair advantage for the few named plaintiffs, at the expense of the many absent ones, by shifting the risks of inaction of some plaintiffs to defendants (if absent class members do nothing, the class action goes forward), we make sure that defendants have an incentive to ensure that the class action enjoys the widest participation among class members.

So the three principles of democratic equality which inform the point of equal access to justice for all would seem to meet most legitimacy concerns with the limitations that the class action device imposes on the individual right to a day in court. But can they justify the distortions to substantive law, which the class action device typically affects? In the US at least, such argument alone could condemn the legitimacy of the class action device: if the latter ‘abridges, modifies, or annuls’ the content of substantive law, then it is in violation of the Rules Enabling Act.

Historically, the argument, which condemns the class action device as illegitimate in light of its distortive effects on the content of substantive law, appears in many forms, and with different nuances. So, for example, we have Uhler’s already quoted line against appropriations by the CRLA fund to finance group litigation: “Why should we pay the

salaries for a lot of guys to run around and look up rules so they can sue the state? [...] What we've created in CRLA is an economic leverage equal to that existing in large corporations. Clearly, that should not be.”⁴⁴

A much more sophisticated version of the argument can be found in Epstein’s paper on the dynamic effects of the class action device.⁴⁵ There, Epstein notices a real tension between “the proper function of a class action and its actual application. On the former, the theory of class actions is to take a weak signal and to amplify it by aggregating small claims that would not otherwise be pursued individually, lowering the cost per individual suit. In practice, many (but by no means all) class actions do more than amplify the status quo ante: sometimes they also *distort* the outcomes by imposing liabilities that are, when the transformations of substance and procedure are taken into account, far more onerous than a rule of simple multiplication would provide”.

Finally, we have Redish’ argument that we have been commenting on. By imposing illegitimate limitations to the individual’s right to a day in court, the class action device modifies the natural, and legitimate, way of adjudicating claims in a democratic state. Thus, the distortions that the class action device produces to substantive law are illegitimate, because they are the by-product of illegitimate violations of the rights and duties, which legal subjects should enjoy in a democratic community.

This is where the three principles of democratic equality should begin to do their work. The introduction of the class action device is justified precisely by reasonable concerns with the democratic legitimacy of adjudicative procedures, *because* individual litigation itself has the potential to ‘abridge, modify, and annul’ the content of substantive

⁴⁴ See M. Abram, *Access to the Judicial Process*, in 6 GEORGIA LAW REVIEW 247 (1972).

⁴⁵ See R. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, in U. CHICAGO LEGAL FORUM 453 (2003)

law. Group litigation is justified whenever individual litigation distorts the content of substantive law in a way, which violates the three principles of democratic equality.

But this means, also, that legislators should legitimately choose between individual and group litigation, by considering the distortions that each might cause to substantive law itself. This is a political choice, to be sure, as it invites decision-makers to evaluate, and then adjudicate, between competing policy objectives, interests, rights and privileges. It is an inescapable one, however, which the three principles of democratic equality, this is what this section has tried to show, help to take in a principled and reasonable way.

14. STILL AGAINST SETTLEMENT?

1. Introduction

In the mid-seventies, Alternative Dispute Resolution, or ADR, were at the forefront of access to justice scholarship.¹ Ten years later, in 1984, Owen Fiss launched his famous attack ‘against settlement’.² In the thirty and more years that followed, ‘settlements’, and thus ADR in general, became one of the most controversial topics in procedural law scholarship, and the question, ‘are you “in favor, or against” the privatization of civil justice?’ (where by ‘privatization of civil justice’ people typically meant the diversion of disputes away from courts to settlement and ADR procedures), one the most pressing questions in the field.³

¹ See, for example, M. CAPPELLETTI & B. GARTH, *Access to Justice: the Worldwide movement to Make Rights Effective – a General Report*, in ACCESS TO JUSTICE: A WORLD SURVEY, VOL. 1 (MAURO CAPPELLETTI, BRYANT GARTH eds., 1978) and M. Cappelletti, *Alternative dispute resolution processes within the framework of the world-wide access to justice movement*, 56 THE MODERN L. REV. 283 (1993); for a detailed historiographical account of the crosscurrents and shifts of emphasis within access to justice scholarship on the theme of ADR, see M. Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORD. URB. L. J. 115 (2009).

² Fiss, Owen M., *Against Settlement*, 93 YALE L.J. 1073 (1984) (from hereinafter *AS*).

³ For a useful guide to these debates, see, for example, Menkel-Meadow, Carrie, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report-Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994), arguing against so-called ‘litigation romantics’. Indeed most of the major reforms word-wide of the civil justice sector, had to first, and, at times, foremost, take sides about whether they were encouraging, or discouraging, mediation and settlement, in its various forms and procedures. An illustrious example are the so-called Woolf Reforms, which, at the end of the 1990s radically transformed English civil litigation. On such monumental reform process, see generally ZUCKERMAN, ADRIAN –CRANSTON, BRIAN (eds.), REFORM OF CIVIL PROCEDURE. ESSAYS ON ACCESS TO JUSTICE (1995), and Andrews, Neil, *A New Procedural Code For England, Party control “Going, Going, Gone”*, in CIVIL JUSTICE QUARTERLY 120 (2000). In fact, the emphasis on speed, limited procedures, proportionality and early case-settlement (which justified the attribution to the judiciary of significant case-management powers), as well as the overarching interest in diverting cases away from the courts and toward private dispute resolution processes, were explicitly thought (within a single, unified set of rules, written in plain English) as necessary means in order to reduce as much as possible the costs of litigation to parties (and the Government, of course!), improve parties’ ability to understand court procedures and, finally, *promote* access to justice. Interestingly, however, strict procedural change was coupled with a radical and historical transformation of the public funding of legal services, driven by the government plan to curb what were understood as exponential increases in government expenditure on legal advice and

Few decades later, Fiss clearly lost the cultural war. Very few legal systems in the world, and certainly even less among market democracies, are, formally and practically, ‘against settlement’ all together – not in the sense, and to the extent, which Fiss recommended in 1984 anyways. In a significant number of legal systems, and in a significantly greater number among market democracies, ADR schemes, or mediation procedures, judicially supervised, court-annex or entirely private negotiations and the general practice of explaining things out with the other party, take, and resolve (or attempt to resolve), the larger share of the stock of disputes in any given country.⁴ If ‘alternative’ means ‘less frequent’ (admittedly, it might not be in reality), then what’s *really* alternative in dispute resolution are adjudicative procedures and authoritative decisions, and clearly *not* settlement and mediation.⁵

There are some valuable consequences whenever the dust settles on cultural wars (with clear losers and winners), which even one on the losing side of the battle can appreciate: controversial dualisms between comprehensive, but mutually exclusive perspectives on the topic of interest tend to lose ground to much more manageable preoccupations, and reasonable plurality can score some points against monotonous antagonism.

representation, see HAZEL GENN, PATHS TO JUSTICE: WHAT DO PEOPLE DO AND THINK ABOUT GOING TO THE LAW (1999), esp. the introduction.

⁴ For a quick overview of current trends, see the essays collected in JOACHIM ZEKOLL & IVO AMELUNG (EDS), FORMALIZATION AND FLEXIBILIZATION IN DISPUTE RESOLUTION (2014); see also CHRISTOPHER HODGES, & ASTRID STADLER (EDS), RESOLVING MASS DISPUTES. ADR AND SETTLEMENT OF MASS CLAIMS (2013) and CHRISTOPHER HODGES & ALT., CONSUMER ADR IN EUROPE (2012).

⁵ For this point, see Taruffo, Michele, *Un’alternativa alle alternative: modelli di risoluzione dei conflitti*, 7 REV. ARG. – PROGRAMA DE MESTRADO EM CIÊNCIA JURÍDICA 257 (2007); see also Taruffo, Michele, *Adeguamenti delle tecniche di composizione dei conflitti d’interesse*, 3 RIV. TRIM. DIR. PROC. CIV. 779 (1999).

Levmore and Fagan's recent paper, analyzing the value (both private and public) of confidentiality in dispute resolution is neither monotonous nor antagonistic.⁶ In fact, as I shall try to show in this section, notwithstanding the fact that it argues *against* Fiss and *in favor of* settlement, their essay also shares important and significant ground with his. Or, in any case, nothing in Levmore and Fagan's essay argues against a plausible reading of several of Fiss' arguments. And there is a lot in their essay, which explains a lot of what's important and still relevant in Fiss' original argument.

So what did Fiss say? At base, Fiss argued against, first, two beliefs about adjudication: 1) it is, essentially, a private good, and 2) empirically, it is always and invariably the result of a bargaining game between defendants and plaintiffs. Second, Fiss argued against one practical consequence which often follows from the acceptance of such beliefs in practical thought: let us divert the largest possible share of the stock of disputes in a given legal system, to so-called 'Alternative dispute resolution' – that is, let us make sure that public institutions practically encourage private negotiation, compromise, and conciliatory agreement, over and against 'legal combat' and 'institutional warfare'.⁷

The immediate target of Fiss' argument (as Fiss himself would later tell) was Derek Bok's call for a change in the legal curriculum.⁸ Law students, Bok argued, are trained in legal combat and learn to argue against someone, rather than to find ways of agreeing with him, through "the gentler arts of reconciliation and accommodation". Bok

⁶ Levmore, Saul and Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal and Sexual Assault Cases*, 103 CORN. L. REV. 311 (2018).

⁷ For an early theoretical reconstruction of this rather natural way of conceiving adjudication, and civil adjudication in particular, see Landes, William M. & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

⁸ Bok, Derek C., *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

added at least one further implication to the two beliefs against which Fiss built his case against settlement – namely, the suggestion that it is precisely law schools’ focus on legal combat which could explain (perhaps only partly) public outcry against excessive ‘litigiousness’, the ever increasing ‘judicialization’ of social life, and unscrupulous ‘entrepreneurial’ lawyering.

If Fiss’ essay is countercultural today, Bok’s was much more so in 1984 (although in a very different way). By then, the institutional project which was explicitly designed to cut the teeth of private litigation as a means to enforcing public law was already well underway.⁹ So Bok was arguing against institutional forces (political activism directed at establishing justiciable rights, and using courts as a principle battlefield), which were already waning and quickly disappearing, and in favor of others (private negotiation and bargain), which were already in full force.

Take away this last, somewhat countercultural, implication however, and Bok’s argument is that increases in the complexity of litigation (which he attributed to the insistence on legal combat) bear the risk of pricing out a significant share of legal subjects, precluding their enjoyment of competent legal services (which teaching the ‘gentler arts of reconciliation and accommodation’ is meant to prevent). And this seems a much fairer understanding of what was about to happen in US Federal Courts.

⁹ On these complex processes of institutional transformation and social reform, see, most recently, BURBANK, STEPHEN & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017); see also Burbank, Stephen B., *Procedure and Pragmatism*, in DEBATING CON TARUFFO, JORDI FERRER & CARMEN VAZQUEZ (EDS.), (2008) (providing, *inter alia*, a quick but very illustrative and clear, description of the institutional factors which account for the litigation explosion in American courts, beginning in the late 60s, contrary to the common and popular perception of an alarming increase in Americans’ litigiousness); KAGAN, ROBERT A., *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (chap. 1 especially) and Galanter, Marc, *The vanishing trial: an examination of trials and related matters in federal and state courts*, in 1 J. OF EMP. L. ST. 459 (2004).

What's more, taking away the pedagogical cause (what law schools teach) from the mere social description (law is becoming too costly for many) clarifies one possible egalitarian concern with 'legal combat', which the 'gentler arts of reconciliation and accommodation' may or may not solve, but that certainly captures an important part of the challenges for equality in access to justice. Due process is a valuable good. It is also a costly one, so who pays the bill might affect how confident we are to use it as *a* tool (or *the* unique one) to administer dispute resolution.

What bothered Fiss the most about Bok's essay was that the latter's call against 'legal combat' and his consequent praise of mediation as a promising solution, seemed to imply (and probably did) the two beliefs and the practical consequence which Fiss so neatly, and forcefully, condemned. In Fiss' reading of Bok, confusing claim-making under the law with 'legal combat' means to forget that, at times at least, parties do not argue, only, for their private benefit, but rather perform a valuable social function, which is the affirmation of public values, enshrined in duly enacted authoritative texts. So adjudication is not *just* a private good (which is the first belief). Advising to teach (and, thus, practice) the 'gentler arts of reconciliation and accommodation' means to recommend strategic bargaining, as opposed to principled argument and adjudication on the merits (the former being how the second belief describes litigation generally), as the standard lawyering skill.

Consider these two arguments together, add a concern with social equality, and it should become clear why Fiss denounced the recommendation to divert the largest possible stock of disputes to private negotiation as an illegitimate attempt to curb the social value of private litigation. First, he argued, there might be significant inequalities

in legal power and social influence between formally equal parties, so strategic bargaining would often look more like violent prevarication, rather than gentle reconciliation. Second, he noticed that enforcing decisions, which are favorable to parties who *lack* effective legal power and social influence, might require extensive judicial supervision, so private negotiation easily means asymmetrical and unequal enforcement of substantive law. And, finally, Fiss believed (and argued in many of his writings¹⁰) that judicial decisions are legitimate as long as they conform to, what he calls, the dictates of public reason, as they publicly articulate the content of authoritative texts, like the Constitution or specific statutes, whereas agreed upon solution to a dispute structurally lack such kind of authoritative legitimacy.

This chapter begins with a presentation of Levmore and Fagan's recent analysis of confidential settlements. Then, it provides a restatement of their analysis, using the three interpretations of equal access to justice, which, this essay argues, constitute the conceptual core of most demands for equality in access to justice. The fourth and fifth sections show how Fiss' original arguments against settlement help one to extend Levmore and Fagan's analysis, in order to include explicit egalitarian considerations in their general treatment of confidentiality in dispute resolution.

The three principles of democratic equality, this is what this section aims at showing, help one to identify what's especially (and currently) valuable in Fiss' arguments against settlement, to use Levmore and Fagan's analysis in order to extend it in a more systematic way.

¹⁰ See especially Fiss, Owen M., *Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) and FISS, OWEN M., *THE LAW AS IT COULD BE* (2003).

2. A summary of Levmore and Fagan's analysis of confidential settlements

There are at least four general observations, which drive Levmore and Fagan's arguments. First, at times, they notice, agreed upon, privately bargained, resolutions to social conflicts can perform at least *some* of the functions which publicly administered, typified, legal remedies perform, at a lower cost. That is, the concrete incentives, which act upon private parties, can conjure up in such a way so as to steer the normative content of the agreement that such parties finally reach (i.e.: who has to do what, and at which and whose costs) in a way, which promotes social welfare. A settlement between a wrongdoer and *one* of his victim (and one victim only), Levmore and Fagan notice, can deter wrongdoing against *other* victims, just as much as conviction and formal punishment (for example, incarceration) or compensation to *all* the other victims, at a much lower social cost. In order to determine when this might be so, what one needs to do so is to compare, in both criminal and civil cases, the deterrent potential of, for example, financial payments, as opposed to incarceration; and then, one needs to identify which parameters in the choice sets of wrongdoers, victims, and third parties (and their lawyers) could steer their behavior toward an agreement with adequate deterrent potential.

Second, often times confidentiality about the content of a settlement is a valuable bargaining chip for *both* parties: settlements are generally more likely if private parties are free to agree upon not only the content of their settlement, but even upon the extent of information which third parties can extract from the latter.

And yet, third, information on the content of settlement agreements might be valuable for third parties as well. Thus, the goal of legal regulation of private settlements

should be to strike a fair balance between cases in which the benefits of encouraging settlements by protecting confidentiality are high enough to justify the costs of depriving third parties of the valuable pieces of information which formal trials could generate, and cases in which the value of such information for third parties advises limitations to private parties' discretion to decide what, exactly, third parties can learn about the content of their settlement.

Finally, in order to determine the right balance between private parties' interests in confidentiality which could steer the agreement they produce toward welfare promoting dispute resolution, and the public interest in the content of such settlement, we are well advised to consider, Levmore and Fagan argue, three things, essentially: 1) the parties' respective interests in privacy; 2) plaintiffs' ability to assess defendants' exposure, and in particular, the former's ability to identify patterns of wrongdoing by defendants; 3) the accuracy and efficiency of the litigation process which settlements are designed to by-pass: the more accurate and efficient the litigation process, the less attractive and useful private settlements become, *and vice versa*.

To illustrate, consider the following case, which Levmore and Fagan themselves use to unpack the intuitions which drive much of their analysis. Suppose that consumer Saul purchases a drug LP from producer Owen. LP endangers a side effect which is generally unknown to the public, but which Saul recognizes and is able to impute to LP itself. At first blush, Levmore and Fagan argue, a settlement between Saul and Owen, which includes a confidentiality clause, deprives the public of valuable information. There might be other injured parties, who could sue Owen, but are unable to do so, because unable to make the association between their injuries and the drug LP, which

Saul made and which grounds his case against Owen. In *this* case, confidentiality is socially undesirable, albeit probably beneficial for both the private parties involved, Levmore and Fagan provisionally conclude, because it comes at the price of under deterrence.

So far, this is the standard, intuitive, trade-off between the benefits and costs of confidentiality in judicial proceedings, and which purportedly justifies attempts by many legal systems to steer private parties away from confidentiality. Whenever we suspect that there might be a pattern of wrongful behavior by one defendant who wishes to settle, confidentiality about *this* case deprives third parties of potentially valuable information for *their* cases, thus compromising law's deterrence (the assumption here is that, of course, there is no trouble with settlements nor with confidential settlements when the case at hand is a one shot event between a one time plaintiff and a one time defendant). In Levmore and Fagan's reconstruction, this intuition should explain, at least in part, why legal systems generally distinguish between intentional and non-intentional wrongs, and, albeit in a rather different way, between the civil and criminal domains, and typically permit (or even encourage) the use of settlements for non-intentional, and civil wrongs, and prohibit it for intentional and criminal wrongs. Intentional wrongs, as well as criminal offences, are typically understood as wrongs against the whole community, whereas non intentional wrongs and civil cases are typically understood as one shot, private affairs – the former advise public authorities to step in and control fundamental aspects of the litigation process, whereas the latter, being private, erratic affairs, are best left to private negotiation and control.

But Levmore and Fagan quickly add a further, a bit ‘counterintuitive’, observation, which significantly complicates the received story about the desirability of confidential settlements. If Saul adequately appraises how much Owen values confidentiality (which depends, for the most part, on Owen’s exposure to other potential lawsuits about similar injuries caused by the *same* drug LP) then the price, which Saul should be able to extract from Owen in exchange of Saul’s silence, should closely approximate Owen’s total exposure to other potential lawsuits. But this means that if Saul (or Saul’s lawyer) competently and effectively bargains his settlement with Owen, the amount that Owen should be willing to pay for Saul’s silence would deter Owen just as effectively as multiple lawsuits initiated by all such other potential plaintiffs, but at a much lower cost. So, even when we have reasons to suspect that there might be a pattern of wrongful behavior by one defendant who wishes to settle (and, thus, we believe that there is a public interest in the information generated in one lawsuit), it might still *not* be advisable to prohibit confidentiality altogether. If at least one plaintiff plays his cards well, then she should be able to extract a price for her confidentiality, which might effectively deter the (potentially) repeat defendant, at a much lower cost than formal litigation.

3. A restatement of Levmore and Fagan’s analysis: effective legal protection, equal standing and party autonomy

Let us begin the critique of Levmore and Fagan’s analysis then by noticing that the three interpretations of equal access to justice which, this essay argues, constitute the conceptual core of any reasonable demand of equal access to justice (namely, access to

justice as equal legal protection; as equal standing in open court; and as equal agency in legal affairs) allow one to reformulate the concrete practical problems which Levmore and Fagan consider in a precise way, and then ‘push’ their analysis forward in a way which is responsive to some of the issues which Fiss raised in his classic paper.

What we are interested in, what Levmore and Fagan are interested in, is to practically assess the conditions for the efficient legal protection of a host of valuable goods and interests. The point of Levmore and Fagan’s analysis is to estimate the impact of protecting the autonomy of private parties to decide over *some* important aspects of the dispute they find themselves involved in on the concrete level of institutional protection of such valuable goods and interests. The protection of confidentiality in settlements between private parties gives the latter ample (formal) control over their dispute, by limiting the amount of information, which others can extract from it, as well as by granting such parties the formal power to bypass the litigation process, which public institutions have designed in order to manage social disputes. Under which conditions, and at which costs, Levmore and Fagan ask (or could be read as asking), is such private control beneficial to the institutional protection of valuable goods and interests?

Notice, furthermore, how Levmore and Fagan’s analysis elaborates on practical considerations which the three principles on equal access to justice also pick up and identify as practically important and relevant. For one thing, pondering on the value (both positive and negative) of confidentiality in dispute resolution implies that we are pondering on the epistemic value of regulating dispute resolution in one way or another. That is, we need to ask ourselves to which socially beneficial uses we can put the

information that we might be able to gather in a private dispute. What is the value of such information, for the parties to the dispute, third parties, as well as for the public at large? Second, inspecting the plaintiffs' abilities to identify defendants' exposure to liability means that we are assessing, at least part of, what this essay calls, plaintiffs' combined capabilities to litigate effectively. That is, Levmore and Fagan are, in fact, studying the impact of party autonomy (in some areas of the litigation process) on the resulting level of legal protection, by accounting for (at least some of) people's capabilities to litigate.

But this means that Levmore and Fagan are giving us – albeit, perhaps, unintentionally, and without even mentioning the word 'equality' itself – an analytical framework with which to study the value of equality (in the space of capabilities) for the regulation of settlements. All we need to add to Levmore and Fagan's analysis is an explicit acknowledgement that, even in the *same* area of law, not *all* parties possess the *same* level of combined capabilities to litigate and then monitor the impact of variations in people's capabilities to litigate on the relation, which Levmore and Fagan establish, between party autonomy (over some aspects of the litigation process, like the confidentiality of the information that is gathered therein) and legal protection.

What I should like to show is that (at least some of) Fiss' most famous and influential observations, and which explain his rejection of settlement as a legitimate technique of dispute resolution, allow us to begin work on such task (that is, *intentionally* study the value of equality in the space of capabilities for the regulation of settlements), in a way which, on the one hand, is congenial to the general approach developed throughout this essay and, on the other, recommends a number of qualified reservations to Levmore and Fagan's most radical conclusions.

4. Levmore and Fagan after Fiss: Five arguments against settlement.

Fiss' critique of settlement as a legitimate means to resolve disputes is part and parcel of a more general critique of the implicit model of adjudication, which settlement enthusiasts, Fiss thought, share. At base, Fiss argued that the latter tend to view adjudication as a quarrel between two neighbors, who "have reached an impasse and turn to court for help". In this story, the two litigants are "roughly equals in power", they are *two*, and they are individuals, who are speaking only for themselves, they merely seek redress, and they are ready to go home and go on with their lives as soon as a final judgment is rendered. The judge is just an impartial *stranger*, ready to step in, and then quickly disappear from the scene, as the quarrel emerges, is litigated, and finally resolved.

Confidential settlements perfectly fit within this model of dispute resolution. When two parties settle, they act on their anticipation of what the court (the impartial stranger) will do. If such anticipation is adequate to make them converge on a few reciprocal concessions which could, also, make them forget about the dispute and get on with their lives, *and* both parties look like the rational maniac of classic RCT, then there is absolutely no point for the 'impartial stranger' to step in and ignite further conflict. Rationally bargained agreements *substitute* the result of formal adjudication, at a much lower cost than public trials.

Fiss' argument is structured, first, to show how far the reality of adjudication is from the reassuring neighbors/stranger story. The neighbors of the story are often *not* neighbors in actual litigation, and they are not equal in powers. Neither is the impartial

stranger always a real stranger to both parties and nor is he always impartial when he simply passively watches them fight. Then, second, Fiss tries to show how a more realistic and adequate view of contemporary adjudication condemns settlements (that is, legislative and judicial encouragement of settlement as the preferred way to resolve disputes) as an illegitimate practice. Settlements are especially bad, Fiss argued, whenever courts are engaged in 'structural reform' and its enforcement. Social inequality among the parties, Fiss observed, tilts the balance against settlement, and deprives it of any legitimacy.

At least implicitly, Levmore and Fagan acknowledge many of Fiss' perplexities about the neighbors/stranger model and, thus, about the latter's way of interpreting the value of settlements. Their argument, which is designed to expand the permissibility of confidential settlements to a larger number of cases than, what they think to be, is the case now in most legal systems, clearly does *not* assume such simple model of dispute resolution. To be sure, Levmore and Fagan never explicitly consider how we should think about cases in which, alongside the particular issue and quarrel which needs to be resolved, there are specific *egalitarian* concerns with the way the dispute at hand should be resolved (indeed, the word itself 'equality' never appears throughout the whole paper).

But many of their arguments and cases do acknowledge a fair degree of complexity in the landscape of actual litigation (consider, for example, the product liability cases which I mentioned already, or the sexual abuse cases, to be discussed presently, and which Levmore and Fagan themselves discuss at some length). Most importantly, most of their arguments (and, in particular, the specific parameters they list)

would seem to work, with some limits, even when one introduces explicit egalitarian concerns within their analysis.

For example, in cases in which there is a pattern of wrongful behavior by *one* defendant, Levmore and Fagan take the existence of at least *one* plaintiff with the ability to correctly price the value of confidentiality for such defendant, to be the key parameter. If there is at least *one* of such plaintiffs, so the argument goes, then such plaintiff can extract a payment that adequately deters the defendant in future cases as well. But this of course assumes (with a few qualifications, to be presently discussed) that at least *some* of the other plaintiffs can litigate somewhat effectively against such defendant, even if they cannot adequately price the value of confidentiality for the latter. An earlier case might lower the cost of similar, future, cases, so that information about the earlier case is valuable for future claimants as well – and, correspondingly, the defendant should then be disposed to pay for confidentiality. But if *no* other potential plaintiff can afford such costs even when so lowered, then the threat that the competent plaintiff can pose to the serial defendant is correspondingly lowered. So, are confidential settlements permissible even in cases in which there are significant variations in plaintiffs' abilities to litigate effectively?

Also, there might not be merely *individual* patterns, involving only individual defendants and a group of plaintiffs, but *social* patterns as well, involving social groups more generally too. Sexual abuse cases are, indeed, a very good example, as there aren't merely repeat offenders, but, in some societies at least, abuses against women contradistinguish (and are enmeshed in) larger social processes, in which *singular* acts (like, for example, Tina being raped by her husband, Dwight) fit larger social patterns

(rape is just *one* form which abuses take) as well as individual defendants (like Dwight) and individual plaintiffs (like Tina) are individual exemplars of much larger social groups (violent males and victimized females). So, are confidential settlements permissible in cases in which the behavior of the defendant doesn't just fit an individual pattern, but a *social* one as well?

If there are no other plaintiffs (apart from the competent 'appraiser' of the value of confidentiality for the defendant) who can pose a judicial threat to the repeat defendant, then the value that the latter shall give to confidentiality is correspondingly reduced, which is one of Levmore and Fagan's parameters. Thus, Levmore and Fagan would certainly not recommend to permit confidential settlements in these cases, since the price for silence that the competent 'appraiser' extracts, in these cases, is *not* enough to deter the defendant in any appropriate way – Unless, of course, merely reputational effects can work as a plausible substitute for the threat of formal litigation. But this adds a further assumption, which might be difficult to swallow, particularly so when the defendant's behavior fits a larger social pattern. Namely, the assumption is that we can think of public opinion as a competent judge of one's doings and interactions with others, even *without* the effective support of formal institutions.

Consider: Whenever sexual abuse fits a larger social pattern, which places men in a privileged, and dominant, position with respect to women, there is the *further* risk that the reputational effects of non-consensual sexual intercourse unevenly affect women and men. In a male-chauvinist society, it might not be a reputational harm, for a man, to be accused of sexual abuse ('that is just what men do'), even when formal laws officially condemn the act as a crime. And yet, it might be *especially* harmful, for a woman, to be

identified as a victim of sexual abuse. Whenever women's consent to sexual intercourse is interpreted, by the dominant culture, as a *privilege* which men can grant, or withhold, according to their own choosing, and *not* as a condition for the permissibility of sexual intercourse itself, being a victim of sexual abuse could be construed as a signal (which the powerful – men, that is – are authorized to send) of the socially recognized worth of the abused.

Here again then, it is precisely by looking at what Levmore and Fagan tell us we ought to be looking at (namely, the parties' respective interests in their privacy) that we can see why, in a male-chauvinist society in which sexual abuses fit a social pattern, confidential settlements in cases of sexual abuse are problematic. Women would most probably be tempted to settle too quickly (if they protest to how they have been treated at all), thus under deterring wrongful behavior by men.

Very similar considerations explain, also, Levmore and Fagan's sensible analysis of why in these cases merely forcing potential plaintiffs to litigate will not do. Egalitarian concerns over the epistemic functions of trials explain one's concern with confidential settlements in cases in which there is a social pattern of wrongdoing. But they *also* explain why we shouldn't simply impose the costs of these functions on active plaintiffs. Democratic egalitarians should be interested in learning facts on how an entrenched social practice harms any group of individuals. They should *also* refrain from harassing these individuals in order to elicit socially valuable information. What explains the social value of this information (as a reflection of situated, and personal, knowledge on a harmful practice) is precisely what explains the social value of protecting its holders from being forced to publicly use it.

However, there are a few further problems, which Levmore and Fagan do not mention, but which advise against both confidential as well as translucent settlements, whenever we suspect that litigation among two parties is the by-product of a larger social pattern.

For one thing, and most directly, known things only can deter anyone at all. So a confidential settlement can deter the defendant who bargained, but certainly not *other* potential defendants. This means that part of the cost of confidential settlements, when there is a social pattern of wrongdoing, is complete renunciation of general deterrence, when general deterrence is most needed. Translucidity offers little help here: confidentiality about the *amount* which is being paid in order to bypass formal litigation, even when there is public acknowledgement of the issues that *could* have been litigated, is precisely what prevents general deterrence to work.

Second, Levmore and Fagan's key observation is, as we have seen, to consider the price that at least *one* plaintiff can extract for confidentiality as a possible deterrent for the behavior of the repeat defendant. In a strong sense then, Levmore and Fagan would like to treat the one plaintiff who is *also* a competent appraiser of the value of confidentiality for the repeat defendant as a representative of the other plaintiffs, who might not be quite as competent. But this shall work when there is an individual pattern, simply because we can quite safely assume that the relevant legal and factual issues in one case are roughly the same in the whole spectrum of cases the repeat defendant could be a party of. When we move from individual patterns to social patterns the assumption becomes far more problematic. Things might look similar enough (and this is why the information the public can gather in one case might be valuable for other cases as well),

but relevantly dissimilar as well, casting doubts on whether one party's ability to vigorously litigate her own case, in order to protect her own interests, is actually of any help for future claimants as well.

More generally, whenever the litigation process deeply affects the interests of a group of similarly situated, but different, individuals, as a *social* group, we shall ask whether anyone case involving a portion of these individuals adequately, and effectively, represents everyone else's interests as well. Settlements, especially when their parties can protect the confidentiality of their terms, typically create distortions within the incentives of those who are authorized to negotiate in the name of the group, or class, or collection of individuals, often without assuring any compensation for the loss of control which *other* group members might be able to exert over the litigation process.

Third, the observation that confidential (as well translucent) settlements are *not* up to task of deterring wrongful behavior which displays a social pattern is a relevant observation, on condition that we first persuasively argue that formal litigation is, at the very least, a comparatively better means to deterring such behavior. But the problem might very well be with deterrence itself, rather than with its specific vehicle (that is, formal litigation or confidential settlements). Changes in law's capacity to deter alter the expected pay-offs of individual choice, and thus affect social behavior *at the margins*. On the contrary, social patterns are typically supported by entrenched habits, which command old responses even when the renewed parameters in one's choice set would recommend (even from the point of view of the egocentric rational maniac of classic RCT) new ones. So the comparative assessment of settlements and formal litigation

recommends an assessment of their comparative abilities to move *beyond* deterrence as the only legal tool, which is available to modify social behavior.

At first blush, settlements might seem much more capable of injecting plurality and creativity within otherwise highly typified, and formal, legal remedies, which are, by their very nature, too closely inspired by a one-size-fits-all mentality. Indeed, much of Fagan and Levmore's analysis would seem to confirm this, as it insists on finding alternative and creative ways to punish, which move beyond incarceration or even formal punishment itself. But their account is too optimistic with respect to private parties' creativity, and rather blind to the significant plurality of legal remedies. Moreover, their analysis typically doesn't consider how remedial creativity interacts with effective enforceability – and neither does it consider how concrete practical problems with the latter often call for both remedial creativity, as well as effective judicial supervision of such creativity. In fact, this is one of Fiss' most famous and influential points in his classic argument against settlements altogether. Consider:

The dispute-resolution story trivializes the remedial dimensions of lawsuits and mistakenly assumes judgment to be the end of the process. It supposes that the judge's duty is to declare which neighbor is right and which wrong, and that this declaration will end the judge's involvement. [...] Often, however, judgment is not the end of a lawsuit but only the beginning. The involvement of the court may continue almost indefinitely. (4S, 1082)

The cases that he had in mind were, of course, the ones he himself called 'structural reform cases' (more on which in the next sections), and which are typically aimed at producing a very peculiar remedy – namely, what Fiss called, 'structural injunction'.

The structural reform cases that play such a prominent role on the federal docket provide another occasion for continuing judicial involvement. In these cases, courts seek to

safeguard public values by restructuring large-scale bureaucratic organizations. The task is enormous, and our knowledge of how to restructure on-going bureaucratic organizations is limited. As a consequence, courts must oversee and manage the remedial process for a long time – maybe forever. This, I fear, is true of most school desegregation cases, some of which have been pending for twenty or thirty years. It is also true of antitrust cases that seek divestiture or reorganization of an industry. (AS, 1083)

Not surprisingly, in fact, Fiss devoted much of his writing *before* his classic article on settlement to identifying, and then studying, the most relevant features of such ‘structural injunctions’, analyzing, in particular, their legal and historical origins, their position within the hierarchy of legal remedies, as well as the conditions which could justify their use, and make their normative content legitimate.¹¹

Fourth, known things only can effectively deter someone; that is, one cannot be deterred by something one does not know. This is not entirely correct, however, since *false* beliefs (and not just *justified* and *true* ones) about something can deter as well. Variations in plaintiffs’ abilities to litigate effectively might reduce, as we have seen, the price that defendants are willing to pay for confidentiality and thus reduce the deterrent potential of confidential settlements. But this is true only if we can assume, also, that defendants can competently assess plaintiffs’ differential abilities to litigate. So, as long as we are confident that variations in plaintiffs’ abilities to litigate effectively are not *socially* visible, we can also safely assume that even confidential settlements have, at least some, deterrent potential. What’s more, concealed inequalities in the legal process (much like concealed weapons in one classic argument against guns’ restrictions) could make confidentiality function as a further protection against inequality generally: oblivious of their actual exposure, defendants would pay much more to the one

¹¹ FISS, OWEN M., INJUNCTIONS (1972).

competent plaintiff, than they actually had to, had they known the actual litigating abilities of the other potential plaintiffs.

But when we move from individual patterns to social patterns, optimism about the egalitarian potential of confidentiality should quickly diminish, as the abilities of defendants to identify the (potential) plaintiffs that come their way is bound to increase. Permitting confidential settlements, then, would simply permit the legal entrenchment and protection of *private* semi-legal regimes, which (either *ex post*, or *ex ante*) neatly distinguish between people on the basis of their abilities to litigate effectively, thus permitting the powerful to strategically bargain the concrete scope of deterrence of formal laws.

Finally, consider the basic rationale, which Levmore and Fagan insist very much on, for encouraging settlements (confidential, or less so). Legal systems, which can reach efficient and accurate decisions about the cases they are called upon to resolve, have little use for settlements. Settlements are valuable when legal systems do *not* efficiently and accurately handle cases. The point needs little argument, as it is almost true by definition.

If settlements are defined as a means to by-pass formal litigation, then their value should clearly depend on the disvalue of whatever it is that they are meant to by-pass. So, inefficient and inaccurate legal systems should highly value confidential and translucent settlements. Efficient and accurate legal systems should value them relatively less.

Not so fast. Inefficiency and inaccurate decision-making in judicial administration might not *equally* harm every legal subjects; especially so whenever there are significant variations in people's abilities to litigate effectively; or, whenever there are social patterns of *legally* wrongful behavior by (relatively more) powerful groups. Consider this

general case: suppose that formal laws promised the enforcement of roughly egalitarian norms, which any legal subject could then use to ground legally valid claims. And yet, the actual distribution of goods and opportunities hardly corresponds, in the legal system in question, to what formal laws promise, and awaits, in fact, rectification by valid claim-making under the law. Inefficiencies and inaccuracies in legal decision-making clearly don't harm everyone equally, here. The relatively better off can strategically exploit inefficiencies and inaccuracies in legal decision-making to hold on to their relatively better position (consider: as inefficiencies and inaccuracies increase, one's *actual* abilities to predict, control, and use competently to one's own advantage, the outcomes of formal proceedings become *more* valuable).

Permitting the relatively better off to by-pass formal litigation, when they choose to do so, might still be advantageous, for *them* – we can still assume (somewhat naively perhaps) that inefficiencies and inaccuracies are *not* the by-product of intentional design, aimed at deliberately excluding the relatively worse off from the egalitarian benefits which formal laws seem to promise. But a democratic egalitarian could still retort, to the comparatively more powerful: 'Inefficiencies and inaccuracies, which currently plague our legal system, are, at least in part, to *your* advantage. It is simply *not* fair that we should authorize you to use your private resources to defend yourself from the inefficiencies and inaccuracies of formal decision-making, whenever the latter happen to be to your disadvantage. So, instead of looking for means to by-pass the legal system entirely (and do it confidentially), you should invest your resources to improve it!'. Encouraging confidential settlements would, at base, merely provide a disincentive, for

the powerful, to *improve* their legal system, by permitting them to get on with their valued activities, even *without* successful reform, which could benefit everyone equally.

5. Legitimacy and publicity in judicial administration: The epistemic and expressive value of public trials.

The neighbors-stranger story, Fiss himself noticed, has at least one great advantage. It provides easy and definitive answers to most legitimacy concerns with the role of courts in public government.

What's the authority of judges to intrude upon the private affairs of legal subjects? According to the neighbors-stranger story, it is the authority of one impartial spectator with a clear and explicit mandate, who is being explicitly and conscientiously entrusted, by such private parties, to dictate a solution to their disagreement. His authority is *just* the authority of *their* consent to be bound by his decision. It is a mere conceptual implication of such story, then, to conclude that there isn't anything wrong with confidential settlements (indeed, there *should* not be, regardless of their larger social consequences). If the authority of judging rests on a singular mandate, conferred upon an individual judge by private parties, then surely no other public authority should have anything to object if such private parties decided *not* to pursue their claims against each other, and amicably, and confidentially, settled them.

There are at least two ways generally to criticize a normative story aimed at the legitimization of an institution or practice. First, and most directly, one should check whether the practical conclusions that the argument suggests, or proposes, actually follow from the set of normative and factual premises the argument begins with. Second, one

should check whether the normative and factual premises themselves adequately capture all the relevant features of the institution or practice in question. The neighbors/stranger story fails in both such dimensions.

The story supposes that disputes are entirely private affairs. Private parties *own* their case (this is the relevant normative, and factual premise), so they can do with it whatever they want (this is the relevant practical conclusion). But this conclusion simply doesn't follow from the premise. Private parties might even own their case, but they certainly do not own the law – that is, they do not own the conditions to obtain the support of public authorities for the protection of their interests. One thing is to suppose that it would be illegitimate to prosecute anyone who doesn't pursue a valid legal claim (a conclusion which the neighbors/stranger story would rightly support). Quite another, is to suppose that it would be a good idea to guarantee the legal enforceability of *any* agreement (no matter its content) with which private parties tried to by-pass formal litigation (which is a conclusion which the neighbors/stranger story would seem to unreasonably implicate).

Also, at least in contemporary municipal legal systems, the relationship between private parties and judges or court officials could hardly be modeled on the concept of a singular, and private, mandate. The salary of judges, for example, is, quite reasonably, paid by public finances and *not* directly by the parties of the case. But these are not the only costs that private parties might impose on the public when they litigate (or settle).

For example, whatever attention one judge should give to one case, she cannot give to other cases; correspondingly, whatever time and costs and general effort, the judicial system can save (or fails to save) by treating *one* case might produce both

benefits, as well as costs, even to cases which have *nothing* to do with the case at hand. It is reasonable, then, for public authorities to regulate the activation of judicial proceedings, by limiting the control private parties have on their *own* dispute – to say when it should start, and when it should finish and why.

Finally, not all parties to judicial proceedings could be adequately thought of as neighbors, having an entirely private quarrel. Often times, as Fiss noted, disputes “concern a struggle between a member of a racial minority and a municipal police department over alleged brutality, or a claim by a worker against a large corporation over work related injuries”. (AS, 1076) When this happens, the case at hand is bound to have effects on third parties as well (other members of the racial minority, workers employed by the same corporation, or by a competitor, or an incumbent in the same market), so that ‘property’ claims by the parties of the case at hand would be hard to support.

All its limits notwithstanding, one of the greatest advantages of the neighbors/stranger story is that it neatly distinguishes between the creation of legal rules and their application. It then assigns the second task (and the second task only) to courts, thus avoiding any intrusion of the judicial branch in legislative affairs. The neighbors are managing their dispute with no intention of producing any innovative change within the normative material formally recognized by valid laws – so the stranger who is asked to resolve it, should not take it upon himself to intrude in the way the two neighbors have agreed to handle their own affairs.

As we move from disputes which involve only one-shot individual players, to ones which involve repeat, but individual, players, and then to ones which involve both one-shot as well as repeat players, whose behavior fits within *social* patterns of

wrongdoing; and thus, as we move from a *binary* conception of legal remedies (the judge merely declares who is right, and then punishes the wrongdoer), to a plural one, concerned also with, for example, structural reform of large organizations (both public and private), the two governmental functions of norm creation and norm application begin to blur around the edges. This is enough to raise reasonable concerns with what exactly should ground courts' interventions in legislative, norm-creating, affairs.

This is why Fiss proposed his own original account of the authority of courts, which directly engaged the legitimacy of their interventions in democratic deliberation and social reform more generally. This is how Fiss summarized his account, twenty-five years later¹²,

Democracy makes popular consent the foundation of legitimacy. That consent is not, however, granted to individual institutions, but extends to the system of government as a whole. The legitimacy of each institution within that system does not depend on consent as imagined in the dispute resolution story, but rather on the institution's capacity to perform a distinctive function within the system of government that is endorsed by the people. The special competence and, thus, the legitimacy of a judge to give concrete meaning to public values [...] derives not from some personal moral expertise [...] but rather from his adherence to what I call the strictures of public reason—the obligation to confront grievances he would otherwise prefer to avoid, hear from all affected persons, try the facts and law in open court, and render a decision based on principle.

Now, as I mentioned already, the approach proposed here is *not* committed to viewing courts as either the best, or a good, or even legitimate, avenue for the direct realization of social change and reform – that is, for the creative production of normative, legally valid, material. One's commitment to equal access to justice (as it is understood by the approach proposed here) doesn't imply a *further* commitment to viewing courts as the lead actors, which should stir social change against recalcitrant majorities.

¹² Fiss, O., *The History of an Idea*, 78 FORDHAM LAW REVIEW 101 (2009).

The interpretation of access to justice proposed here, which views the latter as a combined capability, is meant to encourage political activists as well as scholars to interpret one's abilities to activate, and then participate in, formal judicial proceedings, within a *larger* combination of other social or cultural abilities, and evaluate their effectiveness in protecting goods and functions one has reason to value. In sum, what matters, for the approach proposed here, is the *effectiveness* of one's abilities to make claims, or resist to claims made by others, and the degree of one's control of the various social technologies one needs to use in order to effectively do so. Ample room should then be left, within different legal traditions and cultural histories, to adapt the single components of such combined capability (i.e.: easier access to supreme court litigation, or public intervention in group litigation, or easier access to lawyers, or tighter regulations of the activities of political parties, and so on) to what local, and highly contextual, conditions, or the feasibility itself of reform, would recommend.¹³

On the contrary, Fiss' account, as it is clear from the passage quoted above, is clearly committed to such view. But Fiss' model of judicial legitimacy has a further implication, which is directly relevant for understanding the social harms of confidential settlements, and which the approach proposed here is in a good position to give an account of. And, most importantly, which doesn't depend on one's thoughts on the legitimacy (or even efficacy) of courts to be direct agent of social change against recalcitrant majorities. If the legitimacy of an institution directly depends on its capacity to perform specific functions within the legal system as whole, then in order to appraise

¹³ So the approach proposed here favors a constrained view of the courts, but where constraints are dynamically put by the interaction of larger social processes of political and social activism, with institutional and cultural factors, which courts may contribute to reform or consolidate (I am referring here to Rosenberg's famous distinction in ROSENBERG, GERALD N., *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (1991, 2008), chap. 1).

both the *epistemic*, as well as the *expressive* value of *public* trials (as opposed to confidential settlements) we need an account of the possible uses of the information, which trials produce, even *beyond* formal judicial proceedings.

As I mentioned already, Levmore and Fagan's analysis does provide some room (and a rationale) for considering the possible uses of the information which trials produce even *beyond* formal proceedings. As we have seen, one of Levmore and Fagan's parameters (the parties' interest in privacy) advises interpreters to assess the state of public opinion and the quality of public discussion and deliberation over the issues, which are concretely litigated – and then monitor the impact of publicity about such issues on public debate generally. To be a known victim of sexual abuse is certainly very different in a male-chauvinist society, narrated by male-chauvinist and sensationalistic media, or in a vaguely egalitarian one, with some active, and much vocal, pockets of male-chauvinism, than in a feminist one, reported by reasonable and committed journalists.

But there is much more. David Luban for example, famously questioned the legitimacy of settlements on the grounds that trials provide a forum for the public articulation of norms.¹⁴ Settlements are illegitimate, in Luban's account, because they deprive legal systems (especially in common law countries) of the opportunity to articulate public norms in response to the pressures of litigation. In a very similar spirit, Stephen Yeazell criticizes settlements since they reduce opportunities for appellate interventions in dispute resolution.¹⁵ Indeed, these thoughts are still generally inspired by

¹⁴ See Luban, David, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

¹⁵ See Yeazell, Stephen C., *The Misunderstood Consequences of Modern Civil Process*, 631 WASH. L. REV. 1994 (arguing that settlement erodes the justice system by decreasing appellate review opportunities).

the view of courts as an appropriate forum for the direct realization of legal and social reform.

Within this tradition, Marc Galanter added a further observation, when he eloquently wrote of the ‘radiating effects of courts’, by which it referred to the messages, or signals, both special and general, which courts send, and which might go much beyond the mere normative content of the concrete resolution which the signaling court offered to the dispute before it:

We should not assume that courts are places where cases enter and (subject to attrition) proceed normally and typically to a trial, with genuine adversary contest and a decision according to formal rules. Instead, we should see courts as arenas in which various kinds of dispute (and non dispute) processing takes place [...]. Courts are the site of administrative processing, record-keeping, ceremonial changes of status, settlement negotiations, mediation, arbitration, and “warfare” (the threatening, overpowering, and disabling of opponents) as well as adjudication. Indeed, in most courts, most moves into the formal adjudicatory mode are for purposes other than securing an adjudicated outcome.¹⁶

One might extrapolate from all these thoughts and simply add that publicity in litigation is not only recommendable when it leads to the public *affirmation* of reasonable values. It also provides a way to *test* existing norms and valuations, against their concrete consequences in practical argumentation – and, thus, it helps to identify situations in which valid legal norms do *not* express reasonable valuations. In public trials, we can learn the relevant facts, laid down before us, together with the normative material, which valid legal rules provide. Thus, we can test the value of such rules, as they apply to the concrete problematic situation at hand, by observing the consequences of relying on them in practical argumentation: this is what we can argue and decide, *given* the facts and the

¹⁶ M. Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS (KEITH BOYUM AND LYNN MATHER, EDS., 1983), at 119.

rules we have at our disposal. And this should prompt the questions: Is this an argument, and, thus, a decision, we should want to commit ourselves to? Which changes do we need to make, to our *existing* legal norms, in order to reach a better decision?

In sum, one shall see confidential settlements as harmful, especially so in cases which display relevant social patterns, even when one doesn't believe, also, that courts are the best, or comparatively better, forum where to come up with reasonable, institutional innovations. I call this the epistemic and expressive value of public trials, since they refer to the information, which the public can extract from the litigation process, and from the way the latter is practically organized.

There is a further implication, which is directly relevant for appraising the value of confidential settlements. Notice that in Levmore and Fagan's framework the value of confidential settlements is assessed without explicitly considering the *further* value of assuring a connection between the claim-maker itself and the consequences of the selected institutional procedure for protecting its interests. We conceded this much, because no connection of this kind is needed at all in one relevant dimension of equal access to justice, which we explored – namely, the dimension of equal legal protection. When we are interested in equal legal protection, we are not interested, directly, in establishing a connection between who does the claiming, and the person who benefits from it. But notice, also, that Levmore and Fagan's framework does leave considerable room for appraising the value of the mentioned connection between the claim-maker and the desired consequences of the chosen institutional procedure. This is when, again, they mention the parties' respective interests in their privacy as one relevant parameter in determining how far public authorities and regulation should go in pushing people away

from confidentiality and toward transparency itself. We understand the value of this parameter, because we understand the epistemic and expressive value of creating a connection between the claim maker, and the institutional mechanism designed to protect its claim. And this is where the two further dimensions in equal access to justice should appear to the fore. We are interested in the expressive and epistemic value of the connection between the claim-maker and the chosen institutional procedure, because we are interested in the claim-maker ability's to stand as an equal as it makes claims, or resist to ones by others, and we are interested in its ability to use laws as means to achieve valuable goals and functionings.

Concluding remarks

So, are we still against settlements (and confidential ones especially)? Well, it depends.

If your reason to value settlements (and confidential ones especially) is that you believe that civil disputes are, invariably, a matter between two neighbors, who are simply looking for a way to get by with each other, and go to a stranger to get help in doing that – then that's no good reason at all. Partly because, as Owen Fiss eloquently argued more than thirty years ago, not all disputes (and especially so in contemporary capitalist democracies) are an affair between two neighbors. *And*, partly because, as Levmore and Fagan demonstrate, we have good reasons to believe that, assuming that there is at least *one* super competent and smart plaintiff (*and* most of the other potential plaintiffs meet a threshold level of capabilities to litigate their claims), confidential settlements have a similar deterrent potential to formal litigation and public judicial decision-making, while being far less costly, even in cases in which there is an individual

pattern of wrongdoing. So, confidential settlements could be valuable *even* in cases in which the neighbors-stranger model of dispute resolutions is not particularly perspicuous in its description of actual dispute resolution. Indeed, looking at the historical development of the vast majority of legal systems and jurisdictions in the thirty and more years since Fiss' famous frontal attack against settlement, it is precisely the fact that not *all* disputes are disputes between two neighbors going to a stranger in order to move pass their impasse, what explains the basic attractiveness of settlements (confidential ones, or not).¹⁷

Also, if your reason for valuing confidential settlements is connected with the inefficiencies of formal litigation – then that's no good reason either. Democratic egalitarians should worry about inefficiencies in formal litigation, and work to address them directly, *before* advising to by-pass formal litigation entirely through confidential settlements. The egalitarian potential of confidential settlements *depends* on efficient formal litigation.

Most of all, democratic egalitarians should worry about *social* patterns of wrongdoing, and oppose the extensive use of confidential settlements whenever they suspect that the one case at hand reflects a wider social pattern between similarly situated individuals. In these cases, the analysis of the rules and regulations, which govern formal litigation, and confidential settlements, should be integrated within a larger analysis of how these institutions work to feed public debate and deliberation. Contingent features of the latter might offset the way we value (and, thus, should regulate) both formal litigation and confidential settlements. The value of publicity in litigation goes well beyond what

¹⁷ For this point, see judge Weinstein's (himself not a great fan of settlements, to be sure) comments on Fiss' paper, Weinstein, J., *Comments on Owen M. Fiss, Against Settlement*, 78 FORDHAM LAW REVIEW 1265 (2009).

its final decision says – it has ‘radiating effects’ too and, thus, whenever we analyze the value of confidentiality, we should, also, consider these effects too.

15. ON PRACTICAL ATTITUDES WITHIN THE LITIGATION PROCESS AND THEIR POLITICAL RELEVANCE

Introduction

At several places throughout this essay, I made explicit reference to two common contrasts, which are very often understood as directly following from the general contrast between formal and informal dispute resolution, and between legal and extra-legal activism. On one hand, due process and judicial decisions are taken to rely (or even encourage) anger and resentment as the most appropriate response to injustice (real or perceived), whereas alternative dispute resolution schemes are thought of as encouraging compromise and acceptance, and, often times, they are explicitly designed in order to ease a reciprocal acknowledgement of shared interests, and the construction of a common perspective between the litigants.¹ Litigation, it is often said, transforms any dispute at hand into a zero-sum game: in order for one party to win, the other one has to lose. On the contrary, alternative dispute resolution schemes, it is said, can (or ought to) be designed in a way which allows their participants to transform the dispute at hand in a non-zero sum game: what one party wins, the other one does *not* have to lose.

Any approach to access to justice then, must face the ensuing normative question: is anger at perceived wrongs the appropriate response to injustice and, thus, should social institutions support and protect the ability of people to express their anger throughout the

¹ For example, in an early footnote in *Semi-Confidential Settlements in Civil, Criminal and Sexual Assault Cases*, 103 CORN. L. REV. (2018) Fagan and Levmore quickly dismiss Fiss' arguments against settlement (discussed in chapter 14), as reflecting the classic, and 'wild' position, "in favor of more and more due process and judicial decisions and by implication against turning the other cheek".

litigation process? Or, are compromise and acceptance altogether better responses to disagreement and conflict, and, thus, is the appropriate agenda for dispute resolution reform to steer people away from the cultivation of anger and resentment in their social lives? Answer yes to the first question, and you are a due process enthusiast. Answer yes to the second one, and ADR schemes are your wave of the future. Or, at any rate, this is how current ideological divides might pressure you to define yourself.

On the other hand, often times the desirability of due process and judicial decisions is assessed in terms of their ability to deliver social change and structural reform, *against* systematic, and socially patterned, violations of fundamental interests and rights. This time, due process and judicial decisions are *not* contrasted with ADR schemes and procedures, but with political and social mobilization generally. So, the ensuing normative question here addresses directly political and social activists, and presses them to compare the costs and benefits of legal and extra-legal activism: *given* a socially patterned violation of fundamental interests and rights, where is it most convenient to invest? Should we invest in due process and judicial decisions, or, rather, in political and social mobilization?

In many ways, Owen Fiss' frontal attack against settlement (which we analyzed and discussed in the preceding chapter) is the epitome argument by a due process enthusiast, on both questions. To see this, consider his own distinction between peace and justice. Settlements, Fiss argued, are good for peace, *not* justice. Whereas procedural fairness, according to Fiss, should be concerned with justice – even at the *cost* of peace, if that need be.

But this means, on one hand, that, on Fiss' view, the judge should *not* be seen as the "institutionalization of the stranger to which [...] quarrelling neighbors had turned to resolve their dispute".² Rather, as we have seen, according to Fiss "the judiciary is a coordinate branch of government, charged with the duty of giving concrete meaning to public values".³ Indeed, this is precisely where the last chapter ended: according to Fiss, courts have a special place and function in the realization of public values and, when they work at their best, they guarantee a rationalizing process and a fair resolution to even the most difficult political questions of the day.

On the other hand, wrongs, Fiss could be taken to imply with his distinction between peace and justice, make people legitimately angry with wrongdoers, and due process is there to provide a way to express, and then take advantage of, such anger in an ordered way, in order to promote justice. Legal systems, one could be easily tempted to conclude, should be concerned with encouraging people to take full advantage of the possibilities which due process provide them with, and *not* invite people to simply forgive and move on, in the interest of peaceful (and more productive) coexistence.

Conversely, if due process requires anger and resentment for its activation, then legal systems should legitimately find ways to encourage their subjects to cultivate anger and resentment against legal wrongs. Or so Fiss could be easily read (I bracket the issue of whether Fiss could be *reasonably* interpreted in this way, since he never mentions, nor discusses, the kind of practical attitudes toward social wrongs which due process and settlements are either meant to, or actually do call out, in the relevant social actors).

² Fiss, Owen M., *Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); See chapter 14 in this essay.

³ *Ibid.*

The plan for this chapter is to work on this double contrast, which compares litigation and due process with, respectively, ADR schemes and political activism, and practically test the value and scope of thinking through the requirements of, what this essay called, the duty to, at times and provisionally, pause, cool down and listen, in determining *which* concrete practical attitudes are most appropriate, whenever we litigate our claims, and, relatedly, in evaluating how legal and extra-legal activism could be reasonably integrated within reformist political agendas.

Part of the problem (not all of it, to be sure), however, is that the questions themselves, as I phrased them, are just too general, and miss relevant details. There are certainly many different ways in which different countries express public values through their constitutions, or regulate litigation and understand due process, or institute and regulate ADR schemes, or train and select judges, or regulate and protect democratic spaces for contestatory politics, and there are certainly many ways in which countries generally differ on many other relevant institutional and social variables – *before* we commit ourselves to say *which* specific practical attitudes we should expect litigation, or ADR schemes, to cultivate or transform in their participants (as well as in the general public), and before we commit ourselves to say *when* and *why* due process, as opposed to contestatory politics and social activism aimed at fresh legislation, is a comparatively better (or worse) option to promote social change, we should ask a lot more about the impact of each of the above variables on the relevant phenomena.

However, instead of moving outward, providing an exhaustive classification of legal systems and due process forms, this chapter moves inward, describing *one* specific historical case, and attempts to illustrate how due process functioned in *that* case to move

its participants away from anger and resentment, and integrate legal and extra-legal activism on one hand, and oppositional assertiveness and compromise on the other, in order to achieve structural reform and social change.⁴

As it happens, Fiss himself points us in a very productive direction, when he traces the inspiration of much of his writing on the legitimacy of settlement, and of judicial interventions in social reform, to the work of Judge Frank M. Johnson, a federal judge in Alabama between the 1950s and the 1990s.⁵

I shall focus here just on one case (*Williams v. Wallace*, in 1965) among those that were eventually brought before Johnson's court, because I find it particularly illustrative of the possible roles which due process might play, within reformist political activism, from the point of view of equal access to justice. This the case which adjudicated the right of civil-rights activists to engage in a 50 miles march, from Selma to Montgomery, Alabama, in March 1965, protesting against discrimination against African Americans in voter registration. Judge Johnson famously authorized civil rights activists to march, arguing that, even if its decision reached "to the outer limits of what is constitutionally allowed [...];h]owever, the wrongs and injustices inflicted upon these plaintiffs and the members of their class [...] have clearly exceeded — and continue to exceed — the outer limits of what is constitutionally permissible."⁶

In a creative (and criticized) analogical extension of the principle of proportionality in tort doctrine, to constitutional harms and injuries, Johnson argued that

⁴ The articulation of this chapter's central question, as well as its general conclusion, are inspired by NUSSBAUM, MARTHA, *ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY AND JUSTICE* (2016); and Nussbaum, Martha, *Powerlessness and the Politics of Blame: 2017 Jefferson Lecture in the Humanities*. See also Srinivasan, Amia, *The Aptness of Anger*, 26 THE JOURNAL OF POLITICAL PHILOSOPHY 123 (2018); and CHERRY, MYSHIA & FLANAGAN, OWEN (ED.), *THE MORAL PSYCHOLOGY OF ANGER* (2017).

⁵ See Fiss, O., *The History of an Idea*, 78 FORDHAM LAW REVIEW 101 (2009).

⁶ *Williams v. Wallace*, 240 F. Supp 100 (MD Ala. 1965).

“the extent of a group's constitutional right to protest peaceably and petition one's government for redress of grievances must be, if our American Constitution is to be a flexible and ‘living’ document, found and held to be commensurate with the enormity of the wrongs being protested and petitioned against. This is particularly true when the usual, basic and constitutionally-provided means of protesting in our American way — voting — have been deprived.”⁷

I shall be particularly interested, however, rather than in Judge Johnson's decision itself, in the events that eventually led to his ruling, and then analyze what, if anything at all, due process *added* to the experiences, both of those who concretely made specific claims (namely, civil rights activists, acting on behalf of the Civil Rights Movement, and the larger integrationist public), as well as those who were the targets of such claims (namely, police and state officers for the State of Alabama, and the larger segregationist public, which, the former thought, they were representing).

By carefully re-construing such concrete experiences we shall see, or so this subsection argues, the political and moral logic of imposing a duty to pause, cool down and listen, from the point of view of democratic equality. In fact, the order directed both parties to pause, cool down and listen. And yet it *didn't* ask to either one of them to either hold on to their anger, and then unleash it (in an orderly fashion) in litigation; or, to just hopelessly stand down, turn the other cheek, and forget everything that happened. On the contrary, it is precisely by noticing what's missing from either one of such attitudes (managing one's anger through institutional norms; or hopelessly standing down), that we shall competently inquire on what the duty to, at times and provisionally, pause, cool

⁷ *Ibid.*

down and listen, commands one to do: being adequately responsive to the claims (*both* legitimate, *as well as* illegitimate) of others.

I begin by saying a bit more about Frank M. Johnson and his judicial career, then briefly comment on some of the most famous cases on his docket and finally concentrate on the Selma case itself.⁸

1. Frank M. Johnson's judicial career

Frank M. Johnson used to identify himself as a “hillbilly conservative”, who chewed tobacco, drank bourbon, and loved playing golf and fishing. His public actions and social image attracted more controversy. George Wallace, former governor of Alabama, when ordered by Johnson to hand in black voters’ registrations records, called him an “integrating, carpetbagging, scallywagging, race-mixing, bald-faced liar”. The Ku Klux Klan referred to him as “the most hated man in Alabama”, and made him a target of violent threats and menaces. Dr. King, who initially distrusted him, eventually changed his mind and began to see him as a lawyer who had “given true meaning to the word ‘justice’” instead. Throughout his early years as a Judge, Johnson always declined, until when explicitly ordered, to wear a black robe, or use a gavel, believing such symbols of authority to be unessential to his function. And yet, one lawyer who tried cases before him said that, in court, he “looked at you like he was aiming down a rifle barrel”.⁹

⁸ For historical accounts (on which the following is based) see, especially, BASS, JACK, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS (1993); Bass, Jack, *The Selma March and the Judge Who Made It Happen*, 67 ALABAMA L. REV. 537 (2015); GARROW, DAVID J., PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965 (1978) at 1, 133 – 178 (“In the long saga of southern blacks’ efforts to win free and equal access to the ballot, no one event meant more than the voting rights campaign in Selma, Alabama.”)

⁹ This remark is referenced in both the New York Times and the Washington Posts obituaries, of the 24th July 1999. Here is a few more biographical facts about Johnson. He was from Winston County, Alabama. Two generations earlier than his, when Alabama left the Union, the county unsuccessfully tried to secede

Only few weeks into the job of Federal Judge, he joined a majority of two, declaring that “the established rule”, according to which blacks had to give up their seats to whites if asked, violated the due process and equal protection clauses of the 14th Amendment of the US Constitution, thus extending, for the first time, the principles laid down by the US Supreme Court in *Brown v. Board of Education*,¹⁰ just one year earlier, even beyond the constitutionality of school segregation. This is the case, and the beginning of the social movement, which grew out Rosa Parks’ refusal to give up her seat on a bus in Montgomery. During his tenure, Johnson banned poll taxes, outlawed state laws barring blacks and women from jury service, and actively participated in (and then supervised) the desegregation process of basically all the school districts in Alabama.

Later on in his career, he ordered the State of Alabama to reform its mental hospitals, specifying in great details patients’ rights of decent care; and then commanded the overhaul of its prison system, pointing to a long list of ‘structural changes’ to prison facilities and to the treatment of inmates. Characteristically, George Wallace lamented that the Court’s intervention caused a “hotel atmosphere” in prisons. Undeterred, Johnson replied that “The elimination of conditions that will permit maggots in a patient's wounds for over a month before his death does not constitute the creation of a hotel atmosphere.”¹¹

from the State. After graduating from the University of Alabama’s law school in 1943, Johnson joined the army and saw action as a platoon leader under George Patton during the Normandy invasion, eventually getting wounded twice. Back home, he went into law practice, managed Eisenhower’s successful 1952 Presidential campaign and, in 1955, got appointed to the Federal bench, in the District Court for the Middle District of Alabama – a position he kept until 1979, when he was first appointed to the Court of Appeals for the Fifth District, and then for the newly created Eleventh District in 1981. President Carter was said to having considered his name as the Director of the FBI, but Johnson declined the offer due to his poor health conditions.

¹⁰ 347 U.S. 483 (1954).

¹¹ BASS, JACK, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS* (1993).

This is how Fiss describes Johnson's work as a district judge, trying to enforce the US Supreme Court's mandate to desegregate southern schools:

In personal manner, the judge was strong minded and stern, and ran a rather strict courtroom. He knew that behind his orders lay the contempt power and, beyond that, the force of the federal government, yet he was most reluctant ever to go down that path. Perhaps he feared that the use of force would render martyrs of local officials and make desegregation all that more unlikely. Or perhaps he thought it would be inappropriate, indeed unfair, to punish a local school superintendent for a course of conduct that was dictated by intense, sometimes brutal, pressure from his constituency. Thus determined to avoid the contempt power and the use of force, Judge Johnson turned to the rationalistic processes that have long characterized the law to establish his legitimacy. He patiently listened to all the grievances that were presented to him, heard from all the affected parties, tried the law and facts in open court, and then publicly justified his decision on the basis of principle.¹²

In Fiss' recollection then, Johnson reacted to the "intense, sometimes brutal, pressure" from his constituency declining to use both coercive force, as well as compromise. He sought legitimacy by "turning to the rationalistic processes that have long characterized the law" – which means, in Fiss' account, that he "patiently listened to all the grievances that were presented to him, heard from all the affected parties, tried the law and facts in open court, and then publicly justified his decision on the basis of principle". It is precisely this 'space', all practical and political, between threatened physical coercion and compromise, where "all the affected parties are heard, the law and facts are tried in open court, and then publicly justified on the basis of principle", which I shall now try to explore.

1.1. Johnson's docket

When taken together, a significant chunk of Johnson's most famous cases display all the characteristics, which, the last chapter argued, advise against permitting confidential

¹² Fiss, O., *The History of an Idea*, 78 FORDHAM LAW REVIEW 101 (2009).

settlements. These are cases in which plaintiffs, or defendants, or both, are typically engaged in *social* patterns of legal violations, thus raising concerns with the possibility of significant variations among both formal parties', as well as absent or merely potential ones', combined capabilities to litigate effectively. Characteristically, at least one of the party is an institution, or a member of a larger social group, or one is the former and one is the latter – which raise concerns with the adequacy of adjudicative representation throughout the litigation process.

The Court's final order doesn't condemn, nor is it meant to simply punish, or deter, and it doesn't simply say who wins and why. It also has to specify, and then design a plan to supervise, the concrete conditions of its enforcement – indeed, Court's orders here are, typically, what Fiss called, *structural* injunctions. Finally, the publicity of courts' proceedings isn't merely intended as an opportunity to directly affirm, or creatively elaborate, *new* norms or values, it is also intended to transform the court in a laboratory for experiments in practical argumentation.

The Selma case is both similar in some respects, as well as different in others, to this line of cases. The final judgment didn't condemn or punish anyone, since the plaintiffs sought an injunctive relief, aimed at enjoining the defendants from interfering (in the future) with their lawful attempts at enforcing their right – to political speech, to march, to petition, and, finally, to vote. And yet the final judgment is *not* a 'structural injunction', at least not in Fiss' sense, since the plan of action, which it imposes to both defendants and plaintiffs, is not (directly) aimed at reforming an institution or a habitual social practice. The injunction is about the march of March 21st through March 25th 1965, and nothing else.

Taken together, these characteristics confer to the Selma case an eloquent explanatory power. By describing what happened in Selma, in March 1965, we can comment on the role and use of due process within the larger context of political agitation and turmoil over long standing social conflicts, even when the final judgment which due process itself is designed to produce does not provide a definitive resolution to them.

2. The Selma march and Bloody Sunday

On Sunday, the 7th of March 1965 (“Bloody Sunday”), several hundreds civil rights activists, workers, businessmen, students, housewives, both black and white, took the streets of Selma, Alabama, with a plan to march to Montgomery, Alabama. The marchers wanted to present their grievances, through a formal petition to Governor George Wallace, concerning voter registration processes in the state of Alabama, and express contempt and outrage for the discriminatory practices of Alabama’s state officials, whenever black citizens attempted to register to vote. In fact, Johnson’s court would later find that:

[I]n Dallas County, as of November, 1964, where Negro citizens of voting age outnumber white citizens of voting age, only 2.2% of the Negroes were registered to vote. In Perry County as of August, 1964, where the Negro citizens of voting age outnumber white citizens, only 7% of the Negroes were registered to vote. In Wilcox County as of December, 1963, where the Negro citizens of voting age outnumber white citizens over two to one, 0% of the Negro citizens were registered to vote as contrasted with the registration of 100% of the white citizens of voting age in this county. In Hale County, where Negro citizens of voting age outnumber white citizens, only 3.6% of these Negro citizens have been registered to vote. The evidence in this case reflects that, particularly as to Selma, Dallas County, Alabama, an almost continuous pattern of conduct has existed on the part of defendant Sheri Clark, his deputies, and his auxiliary deputies known as “possemen” of harassment, intimidation, coercion, threatening conduct, and, sometimes, brutal mistreatment toward these plaintiffs and other members of their class who were engaged in their demonstrations for the purpose of encouraging Negroes to attempt to register to vote and to protest discriminatory voter registration practices in Alabama. This harassment, intimidation and brutal treatment has ranged from mass arrests without just cause to forced marches for several miles into the countryside, with

the sheriff's deputies and members of his posse herding the Negro demonstrators at a rapid pace through the use of electrical shocking devices (designed for use on cattle) and night sticks to prod them along. The Alabama State Troopers, under the command of the defendant Lingo, have, upon several occasions, assisted the defendant Sheri Clark in these activities, and the State troopers, along with Sheri Clark as an "invited guest", have extended the harassment and intimidating activities into Perry County, where, on February 18, 1965, when approximately 300 Negroes were engaged in a peaceful demonstration by marching from a Negro church to the Perry County Courthouse for the purpose of publicly protesting racially discriminatory voter registration practices in Perry County, Alabama, the Negro demonstrators were stopped by the State troopers under the command of the defendant Lingo, and the Negro demonstrators were at that time pushed, prodded, struck, beaten and knocked down. This action resulted in the injury of several Negroes, one of whom was shot by an Alabama State Trooper and subsequently died.¹³

On that Sunday, the marchers met in front of the church, in Selma, and then walked south, toward the Edmund Pettus Bridge, which is where US Highway 80 crosses the Alabama river, toward Montgomery. This is how the court would later describe what happened next.

The[...marchers] proceeded on a sidewalk across the bridge and then continued walking on the grassy portion of the highway toward Montgomery until confronted by a detachment of between 60 to 70 State troopers headed by the defendant Colonel Lingo, by a detachment of several Dallas County deputy sheriffs, and numerous Dallas County "possemen" on horses, who were headed by Sheriff Clark. Up to this point the Negroes had observed all traffic laws and regulations, had not interfered with traffic in any manner, and had proceeded in an orderly and peaceful manner to the point of confrontation. They were ordered to disperse and were given two minutes to do so by Major Cloud, who was in active command of the troopers and who was acting upon specific instructions from his superior officers. The Negroes failed to disperse, and within approximately one minute (one minute of the allotted time not having passed), the State troopers and the members of the Dallas County sheriff's office and "possemen" moved against the Negroes. The general plan as followed by the State troopers in this instance had been discussed with and was known to Governor Wallace. The tactics employed by the State troopers, the deputies and "possemen" against these Negro demonstrators were similar to those recommended for use by the United States Army to quell armed rioters in occupied countries. The troopers, equipped with tear gas, nausea gas and canisters of smoke, as well as billy clubs, advanced on the Negroes. Approximately 20 canisters of tear gas, nausea gas, and canisters of smoke were rolled into the Negroes by these State officers. The Negroes were then prodded, struck, beaten and knocked down by members of the Alabama State Troopers. The mounted "possemen," supposedly acting as an auxiliary law enforcement unit of the Dallas County sheriff's office, then, on their horses, moved in and chased and beat the fleeing Negroes. Approximately 75 to 80 of the Negroes were injured, with a large number being hospitalized.¹⁴

¹³ Williams v. Wallace, 240 F. Supp 100 (MD Ala. 1965).

¹⁴ *Ibid.*

On Monday, named plaintiffs Hosea Williams, John Lewis, and Amelia Boynton (all leaders of the Civil Rights Movement, who marched and, then, endured the police attacks the previous Sunday) filed several motions with the US District Court for the Middle District of Alabama, on behalf of themselves, as well as representatives of ‘others similarly situated’. They demanded the Court to enjoin and restrain the defendants – George C. Wallace (then Governor and chief executive officer of the State of Alabama), Albert J. Lingo (then Director of Public Safety of the State of Alabama) and James G. Clark, Jr. (then Sheriff of Dallas County, Alabama) – from “arresting, harassing, threatening, or in any way interfering with their peaceful, nonviolent march from Selma, Alabama, to Montgomery, Alabama, for the purpose of protesting injustices and petitioning their State government, particularly the chief executive officer — the Governor — for redress of grievances”. Recognizing that “their constitutional right to march along U.S. Highway 80 for their intended purposes is not an unrestricted right, but, to the contrary, must be exercised, if exercised at all, within [a] ‘constitutional boundary’”, the plaintiffs also filed a plan, which detailed a proposal for the concrete organization of the upcoming march.

On Tuesday, the 9th of March, Judge Johnson denied the plaintiffs’ application for a restraining order, on the grounds that it was sought without notice to the defendants, and without a hearing. The court also entered an order, which temporarily restrained the plaintiffs from any further attempts “to enforce the rights they ask th[e] Court to judicially determine, until the matter could be heard”.¹⁵

Neither the plaintiffs, nor the defendants, were particularly pleased with Judge Johnson’s order. The defendants wanted him to enjoin and restrain the plaintiffs (as well

¹⁵ *Ibid.*

as anyone else) from continuing the march, or any other mass demonstration, in the site. They wanted them to silently disperse and go home – and that, the Court did *not* say. The plaintiffs (as well as the other members of the social movement they acted on behalf of) felt that further injury and unreasonable delays were added to an already intolerable condition. In his testimony at trial, Dr. King candidly admitted that “I felt that it was like condemning the robbed man for getting robbed and allowing the robber to go uncondemned, and I made it very clear that this order was an order that I was very concerned about and very upset about, but I did not, in spite of saying this, ever say that I was defying the court order.”¹⁶

After a long negotiation between Dr. King, Jack Greenberg (the lead attorney for the NAACP Legal Defense Fund in Selma), Attorney General Nicholas Katzenbach and former Florida Governor LeRoy Collins (who had been sent to Selma by President Johnson, as the head of the Community Relations Service, established by the Civil Rights Act 1964) on Monday night, the Movement’s leaders decided to stage a symbolic demonstration on Tuesday morning, when they would simply reach the point on the bridge where the brutalities occurred on Sunday, and then make “some kind of witness, some kind of testimony, to have some prayers, because of the numerous religious leaders who had come in from all over the country.” At the bridge, the marchers waited for police agents to back down; then blinked, and turned back to Selma.

On March 19th, after four days of hearings, Judge Johnson issued his orders, which enjoined and restrained Alabama’s state officials to interfere with the marchers’ right to peaceably assemble and demonstrate from Selma to Montgomery, according to

¹⁶ See Bass, Jack, *The Selma March and the Judge Who Made It Happen*, 67 ALABAMA L. REV. 537 (2015).

the plan, proposed by the plaintiffs themselves. Between March 21st and March 25th, the march took place again, this time with the full, and explicit, backing of the law. Standing in front of the state capitol in Montgomery, Dr. King delivered one of his most famous and eloquent speeches:

Once more the method of nonviolent resistance (*Yes*) was unsheathed from its scabbard, and once again an entire community was mobilized to confront the adversary. (*Yes, sir*) And again the brutality of a dying order shrieks across the land. Yet, Selma, Alabama, became a shining moment in the conscience of man. If the worst in American life lurked in its dark streets, the best of American instincts arose passionately from across the nation to overcome it. (*Yes, sir. Speak*) There never was a moment in American history (*Yes, sir*) more honorable and more inspiring than the pilgrimage of clergymen and laymen of every race and faith pouring into Selma to face danger (*Yes*) at the side of its embattled Negroes.

[...]

Today I want to tell the city of Selma, (*Tell them, Doctor*) today I want to say to the state of Alabama, (*Yes, sir*) today I want to say to the people of America and the nations of the world, that we are not about to turn around. (*Yes, sir*) We are on the move now.

[...]

And so I plead with you this afternoon as we go ahead: remain committed to nonviolence. Our aim must never be to defeat or humiliate the white man, but to win his friendship and understanding. We must come to see that the end we seek is a society at peace with itself, a society that can live with its conscience. And that will be a day not of the white man, not of the black man. That will be the day of man as man.

[...]

How long? Not long, because the arc of the moral universe is long, but it bends toward justice. (*Yes, sir*).¹⁷

Later on the same day, President Lyndon Johnson addressed the nation from Washington with a moving speech, which he concluded by reciting the very slogan of the Civil Rights's Movement ('We shall overcome'), pledging to turn African Americans' aspirations to equal citizenship into enacted law. On the 6th of August 1965, President Johnson signed the Voting Rights Act.

¹⁷ Address at the conclusion of the Selma-Montgomery march, available at <https://kinginstitute.stanford.edu/king-papers/documents/address-conclusion-selma-montgomery-march>.

3. The point of *at times and provisionally, pause, cool down and listen* in political activism

One way to frame the events of Bloody Sunday is to interpret the respective claims of the two groups as lamenting injuries to their social status, in the eyes of the opposing group. Petitioners lamented their status as second-class citizens, whose legitimate efforts to participate in the democratic life of the state and the nation (by voting, or peacefully demonstrating) had been met with threats and violence. The defendants lamented the petitioners' disregard for 'established rules', which successfully (from *their* point of view) governed race relations throughout the years, as well as their rejection of the authority of state officials to maintain peace and order. The marchers constituted an illegitimate threat to the social status of whites in Alabama, because they constituted a threat to well established social conventions and, thus, to peaceful and orderly social life throughout the state.

There seems to be an implicit, but all important, consequence in holding on to, or relying too closely on, this way of framing the relevant issues, however. For whatever solution to the problem at hand (shall we authorize the march or not?), could be then read as inviting, or calling up and rationalizing, a mere desire for compensation and payback.

If blacks were right and violence and police brutality on Bloody Sunday were a real and illegitimate injury to their status as citizens, then it would have been rational, for them, to desire that whites' social status should be correspondingly 'pushed down'. Conversely, if whites were right, and the marchers did constitute an illegitimate threat to their social status, because they constituted a threat to well established social conventions and, thus, to peaceful and orderly social life throughout the state, then it would have been

rational, for them, to desire to ‘down-rank’ blacks even further. In this scenario, it would seem that anger and quiet acceptance are the only possible alternatives for the two groups. If one wins, then it can be legitimately outraged with the other, and rationally wish for, and then act, so that the latter’s relative status is pushed down. Conversely, if one loses, one has to quietly accept the result, and then move out of the way.

But due process enabled the relevant social actors to do something quite different instead, inviting them to re-construe the point of the hearing as precisely to steer *both* petitioners and defendants *away* from an interpretation of the events on Bloody Sunday, which, beginning with the recognition of injuries to their social status, would then have them conclude that the rational solution to the problem at hand could only be pay-back and compensation. The technique employed, as we shall see, was quite simple: to grant equal standing in open court to members of both groups, so that the imposition of a duty to pause, cool down, and listen, could call out instead a creative transformation of both anger and quiet acceptance as the only available alternatives.

Consider the defendants first. Their claim that the march constituted a threat to their social status had the facts wrong. Nothing that the marchers had or could have done constituted a wrongful injury to their social status. So their desire for pay back and compensation was unjustified, quite simply, because based on false beliefs. What’s important to add, however, is that the hearing itself presented defendants with a good opportunity to move their concern for perceived but unreal threats (an injury to their social status) to a concern for real and legitimate interests (i.e. the public interest, shared by *both* whites *and* blacks, in unfrustrated cooperative activity and social life generally along public streets and highways).

To see this, let me analogize this case and social setting, with a very different one. In her account of her own experiences as a black female student at Harvard Law School, Patricia Williams tells the story of a classmate of hers, C. – a six feet tall, black, woman.¹⁸ During one Christmas vacation, C. was travelling to Florida with two friends, when they stopped in a roadside – all white – diner just outside Miami. C. ordered a hamburger and a glass of milk, which, C. thought, was sour. The waitress ignored her requests for another glass, and C. refused to pay for it. As the waitress started to shout her anger at C., a highway patrolman, who was sitting at another table, intervened, ordering C. to pay and leave. When she refused, he pulled out his gun, pointing it at her.

Now C. is not easily intimidated and, just to prove it, she put her hand on her hip and invited the police officer to go ahead and shoot her, but before *he* did so he should try to drink the damn glass of milk, and so forth and so on for a few more descriptive rounds. What cut her off was the realization that, suddenly and silently, she and her two friends had been surrounded by eight SWAT team officers, in full guerrilla gear, automatic weapons drawn. Into the pall of her ringed speechlessness, they sent a local black policeman, who offered her twenty dollars and begged her to pay and be gone. C. describes how desperately he was perspiring as he begged and, when she didn't move, how angry he got - how he accused her of being an outside agitator, that she could come from the North and go back to the North, but that there were those of "us" who had to live here and would pay for her activism.¹⁹

This is a story about race. If we don't know that C. and her friends are black, we simply cannot understand what happened in the diner. This is a story, also, of perceived (both real and imagined) injuries to social status and standing. C. is outraged with the fact that the waitress simply ignored her requests, treating her as a second-class customer, who should simply be happy with whatever it is that has been given to her – 'make your order, be quiet, pay, and then leave'. The waitress too, it would seem, is concerned with her social status and standing – she would *not* be ordered around by C. Race is all important

¹⁸ WILLIAMS, PATRICIA, *THE ALCHEMY OF RACE AND RIGHTS: A DIARY OF A LAW PROFESSOR* (1991).

¹⁹ *Ibid.*, at 20.

to understand why C. would read contempt and disdain in the waitress' impatience, just as much it is necessary to understand why the waitress would read arrogance and a threatening attitude in C.'s requests.

But if we, temporarily and fictitiously, remove race from the scene, then we begin to see something different as well (it is important, I would submit, that we understand this to be a temporary fiction, whose value should be assessed then in terms of the understanding it generates when we 'put' race back in the scene).

For one thing, the waitress, as well as the police officers, begin to look quite 'dumb and foolish'. In fact, I would argue, this is the traditional material with which the literary genre of the 'Comedy of errors'²⁰ is typically developed: we selectively give to the characters in the plot different, and often contradictory, pieces of information about each others' plans and beliefs, or identities, or about the general situational context they are all enmeshed in. And we then watch them, and laugh, as they act foolishly, when even just a few words, or virtually costless actions, could have simply straighten everything out: 'Put the guns down, and just taste the damn milk!'. Quite tellingly, the *only* officer who doesn't look foolish is the black officer who offers to pay for the milk. He perfectly realizes that his colleagues are not *just* foolish, they are racists. *He* doesn't look foolish in turns, but clumsy and awkward: 'Why would you want to pay for a glass of bad milk that you didn't even order!'.²¹

²⁰ I am referring here both to Shakespear's play of the same name (WERSTINE, PAUL AND MOWAT, BARBARA A. (eds.) THE COMEDY OF ERRORS (1996), as well as to the associated genre within Plautus's comedies.

²¹ C. doesn't look foolish, nor clumsy or awkward. She looks impetuous, both in sense of displaying great force, as well as in the sense of impulsive, and rash. The cue is in how she stands, hand on the hip, six feet tall, questioning the highway patrolman's jurisdiction, without noticing that a SWAT team (!) has surrounded her. *Given* the situation at hand, not being fully aware of one's surroundings is, I would submit,

If we now put race back in the scene, we can see why, from the point of view of the waitresses and the police officers, it would have been a very good idea to pause ('stop ordering people around'), cool down ('put the guns down') and listen ('Taste the damn milk at once!'), as it would have given them an opportunity to see just how dumb and foolish they all looked, and then connect this realization, with their views on race. They look dumb and foolish here, *because* they are racist.

Admittedly, it would be difficult and most definitely naïve to understand this as a missed opportunity, on part of the waitresses and police officers, for a moral conversion of their beliefs about race. Moreover, to avoid looking 'dumb and foolish' is not the *best* reason one should have for not being a racist. It is reason *enough*, however, to ask oneself an all important question, which might anticipate, or lead one to, a more thoughtful moral appraisal of one's beliefs about the implications (and the demands) of 'interracial' interactions, for fair cooperation and justice: 'How often do I look 'dumb and foolish' just because of my beliefs about race? Why is it so?'.

The analogy is not perfect, of course. Even if, temporarily and fictitiously, we removed 'race' from the scene in Montgomery, Alabama police officers and state officials do not look 'dumb and foolish'. They still look violent and threatening so that the first thought is, understandably, that they should have been immediately incapacitated and deterred from repeating their offenses, and *not* simply given a chance to re-think what they did. But even here, it would be difficult to argue and naïve to think that, had every white citizen of Alabama genuinely complied with his (putative) duty to pause ('Stop harassing and threatening civil rights activists'), cool down ('go to the witness

the best recipe for pointless disaster (even when it is caused by righteous and understandable motives) – courage typically requires just as much thoughtful training and smart preparation as fraudulent deceit!

stand, or go to court and watch or read about the trial on a newspaper'), and listen (to the claims that blacks are making, or to the questions that are being asked), then this fact alone would have generated a universal moral conversion, making everyone realize the harms of discrimination against blacks. However, genuine compliance with the duty provided, in this case, a good enough opportunity to rethink and revise at least some significant portion of the social rules which governed inter-race relations and interactions in Alabama.

Consider: the issue was not, strictly speaking, to find fault with the conduct of Alabama state officials *in order to* punish, and blame them for their wrongdoings against blacks. Proof of Alabama state officials' wrongdoings was rather used as evidence that the latter's conduct *wasn't* genuinely directed at the protection of any valuable interest and, thus, as evidence that a *new* balance between legitimate but competing interests was required. So defendants and their witnesses were given a chance to avoid rationalizations, and to be honest and forthcoming, without any fear of punishment and blame. Also, and relatedly, plaintiffs didn't ask for the defendants to lose their authority altogether. Governor Wallace, as well as Chief Clark, for example, could still issue valid commands and orders to blacks generally, and to the marchers particularly. The point of the hearing was to *redefine* the proper scope, ground, content as well as the general point of such orders.

Finally, the plaintiffs did recognize the worth of the competing interests, which could put reasonable restraints to their right to peaceably assemble and demonstrate. This much gave an opportunity, to the defendants themselves, to ask, 'which interests and goods we find ourselves most fearful of losing? Is there a way in which we can think

about their effective protection without denying blacks' right to march, or their right to vote?'.

Let us now consider the plaintiffs. At first blush, their position would seem to fit the 'outrage at an injury to one's social status – rational desire for pay back and compensation – down ranking of the wrongdoer' practical scheme. Denying their right to march and, even more so, denying their right to vote, constituted, indeed, wrongful injuries to their social status as equal citizens. They had their facts right, and the satisfaction, which an effective, angry response would promise – down ranking whites – might seem (and might have seemed) to adequately compensate the injury. And yet, we can see the difficulty of – and, as I shall argue in a moment, the political brilliance in – what the petitioners achieved in practical action, by noticing that they accomplished to do something which looks quite similar to *both* angry contestation aimed at pay back and compensation, *as well as* quiet acceptance, while actually being neither.

King's first reaction to Johnson's injunctive order reflects very well the ambiguities, which the petitioners needed to resolve in order to achieve this. He was frustrated, as the restraining order put on hold the concrete realization of his most immediate goal – namely, march through the streets of Selma and Montgomery. And there was a lot of understandable impatience as well – 'we have been threatened, and harassed, when not clubbed and beaten, and you ask *us* to wait?'. And there was a lot of understandable resentment too, for the subtle, largely implicit, but still rather clear, implication, that it was *them* – the marchers, that is – who were, somehow, in the wrong, who needed to justify their position, and make it subject and exposed to the judgment of others – 'Wait a minute, we are claiming that something has gone terribly wrong with the

way *they* (police officers, and state officials) treat *us*, and yet *we* are the subjects of a restraining order?’. This is just, to use King’s words again, ‘the robbed who is being punished for having been robbed’!

It must have been tempting, then, for Dr. King and the other leaders, as well as for the rest of the marchers, to simply say, ‘we shall defy the court’s order, show our strength and unity, and our willingness for personal sacrifice, and march anyways. If *they* are not ready to recognize our status as citizens, who have a right to peaceably demonstrate and assemble, and a right to vote, then, at the very least, *we* are going show how far *they* are ready to go (beat us and, even, eventually kill us), in order to deny us our equal rights as fully dignified human beings’. Indeed, that is not very far from some of the reported intentions of some of the leaders of the movement. Immediately after Bloody Sunday (and thus before Judge Johnson notified the restraining order), Roy Wilkins, then the executive director of the NAACP itself, reportedly announced that, unless the Federal Government were to take immediate action against Alabama state officials, “There is going to be resistance with weapons, protection of ourselves with weapons”.

The political point of recognizing a duty to pause, cool down, and listen, and then act in compliance with it, illustrates the transformative reach of rejecting this line of thinking. For one thing, it gave the marchers a chance to recognize the authority of the most powerful actor in the scene – namely, the Federal Government – in a way which, in turn, *presupposed* the latter’s commitment to recognize their dignity as equal citizens.

Recall, again, what happened on the bridge during the second, ‘symbolic’, march: the marchers waited for state troopers to clear the way, and *then* turned back to Selma, thus complying with the court’s order. This sent a clear signal, in turns: ‘we are not

deterred by physical violence and threats. We turn away because we shall comply with a court order, which also gives us an opportunity to speak up, and be heard, and propose a plan going forward'. Correspondingly, recognizing the authority of the court's order gave them a chance to explicitly recognize the worth of the competing interest (and *that* only) which could justify restrictions to their constitutional right to peaceably assemble and demonstrate – namely, the public interest in 'the safety and convenience of the people in the use of public streets and highways' – thus effectively deflecting attention, at least temporarily, from the perceived threats constituted by the march itself to the 'social status' of whites, to a concrete and practical assessment of the (legitimate) interests which conspired to rationalize the former.

The mere venting of anger at racial discrimination, both justified and understandable as it surely was, could have hardly accomplished this much. Anger takes its object (the thing or person one is angry with) as the target for one's actions. The practical response that it unleashes doesn't require a successful communicative interaction with its object to satisfy the stimulus, which generated it. This is especially clear, if the concrete stimulus, which anger responds to, is, like it could have very well have been in this case, a desire to compensate a status injury one believes one has suffered because of someone else, by 'pushing down' the relative standing of such person, and thus adjusting his relative status with respect to one's own. At least in this case, the recognition of the person one is angry with, as someone who, despite his (claimed) wrongdoings and misgivings, can *still* make claims and demands on us, presents itself as an obstacle, which might prevent anger from getting its trophy – namely, effectively 'pushing down' the status of the person one is angry with. Of course,

‘pushing down’ someone else’s status does not, by itself, necessarily implicate a denial of such person’s standing as a human being with equal dignity, and, thus, as a person who can still make claims and demands on us.²² *This* is precisely what the duty to pause, cool down, and listen is meant to accomplish, as it prevents anger at injustice from transforming itself in a desire to annihilate the wrongdoer, by denying his dignity as a human being.

4. Conclusion

If a political or social movement wishes to affect a structural transformation of a well entrenched social practice, which (purportedly) unfairly burdens one or more relevant social groups, should it best invest its resources (financial, human, or otherwise) to standard political activism and campaigning aimed at producing fresh legislation, or should it rather invest them in a litigation strategy aimed at a court order (or a series of court orders), which could directly engage one foundational element of the social practice itself?

This is a big practical question, which political activists (and scholars in law and the social sciences) have long begun to consider. This chapter tried to answer it in a most provisional, tentative and piecemeal way, by focusing on one specific historical moment of both judicial and political activism: the events surrounding the Selma March of 1965 (which contributed to the enactment of the Voting Rights Act), and the different parts, which the various relevant social actors played at the time.

²² For this point, see NUSSBAUM, MARTHA, *ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY AND JUSTICE* (2016); and Nussbaum, Martha, *Powerlessness and the Politics of Blame: 2017 Jefferson Lecture in the Humanities*.

The first and most direct point, which this chapter attempts to make, is that thinking through the requirements of, what this essay has called, the duty to, at times and provisionally, pause, cool down, and listen, in way which is informed by the three principles of equal access to justice, helped the relevant social actors (the Civil Rights Movement, especially) to design a contentious strategy, which integrated political and social activism with judicial engagement in litigation, and made them mutually supportive tools aimed at social change. In particular, thinking through the requirements of the duty in this informed way, helps one to see how Civil-Rights activists were able to steer their political movement, as well as (at least) portions of the public audience, away from anger and retribution as the *sole* rational responses to injustice and unfair injury.

CONCLUSION

The first time I personally met a professor, who I admire a lot, was at a moderately formal dinner party. We quickly got down to the important business of political argumentation as he inquired about my work. I must have said something about access to justice, and legal aid, and equality and the importance of it all...but his first reply was a bit disconcerting: ‘Oh, what a waste of time!’, he said.

Luckily, it didn’t take me too long to rationalize the comment, with a less alarming interpretation. Perhaps he *wasn’t* referring to the project itself – to write about access to justice, or legal aid, or equality, or any of the other things I might have said. Perhaps he was referring to the subject matter itself. Access to justice *itself* (or, at least one of its central components, like litigation) is a waste of time.

The alarm didn’t vanish, to be sure. Litigation certainly might waste a lot of many people’s time, and it very frequently does so, I quickly realized I had to concede. The intuition that *actual* recourse to a great variety of social institutions (like law, litigation, judges, lawyers, and so on), which are designed in order to provide institutional recognition to access to justice is (most, if not all, times) a merely ‘second-best’ option (if that) has clearly great appeal.¹ But the availability of access to justice and, particularly, its *equal* availability, still seemed (to me, at least) a very different matter entirely. But that meant, also, and this is where the alarm remained, that the road to understand the value of access to justice (as well as the value of *equal* access to justice) began to look very steep.

¹ This not exclusively true of access to justice, of course. Medical care is another big example. Going to one’s dentist – just to stick with an easy example – is probably a ‘second-best’ option, if that, most of the times for most people.

The alarm began to grow into a sense of intellectual excitement, however, when I realized that I had already read a very similar punch line, coming from a *very* different source, drawing very different implications indeed. “Legal aid”, Richard Abel once argued, “is a social reform which begins with a solution – lawyers – and then looks for a problem it might solve, rather than beginning with a problem – poverty, or oppression, or discrimination, or capitalism – and exploring a solution”.² There is an enormously different segue here, of course. In Abel’s famous attack against legal aid, the latter is a ‘waste of time’ largely because its delivery on an individual basis, effectively undermines the very possibility of collective action by the relatively worse off (the beneficiaries of legal aid, that is), aimed at structural changes in social cooperation. My intellectual excitement grew at this thought because, I noticed, similar value-judgments, which are based on wildly different presuppositions and justifications, and which advise significantly different practical deliberations, clearly call for some theoretical pruning and probing, either in order to justify action on partially theorized agreements; or, in order to identify deeper ambiguities in their interpretations of the relevant phenomenon.

Some time after this episode, I had the good fortune to *see*, at least figuratively, a similarly alarming comment (from the point of view of my project, at least) on access to justice. But this time I could see it in action, in a story depicted in a Chinese movie on a

² Abel, R.L., *The Paradoxes of Legal Aid*, in PUBLIC INTEREST LAW (J. COOPER & R. DHAVAN EDS., 1986), at 386. Perhaps the diagnosis depends here, more generally, on Abel’s understanding of the role, which theory should play in practical assessments about the real world. Certainly, if the theoretical task is to specify how things should work out under ideal conditions, then beginning with a *solution* at hand doesn’t seem attractive at all. On the other hand, however, if one point of theoretical exercises in practical matters is to affect marginal improvements of present conditions, it doesn’t seem altogether too unreasonable to begin with a solution (lawyers, in this case) and then work a way out to identify which problems exactly it (they, that is) can be a solution to. That’s just how we go about solving many of our problems in the real world as well – we *already* have a tool, which costs us a great many valuable resources to produce (lawyers, that is), let us then find a good use we can put it (them) to. Unless, of course, the solution itself causes us (for some structural reason) to deviate from reasonable action. And that’s, indeed, Abel’s *further* argument.

very odd dispute, with a very disconcerting resolution. In *The Story of Qiu Ju*, the title character is a young Chinese woman who lives in a small farming community with her husband. During a quarrel, the village chief, feeling insulted, violently kicks *Qiu Ju*'s husband in the groin, causing him to see a doctor and miss work. *Qiu Ju*'s story is about her difficult, and ultimately unsatisfied, attempts at finding proper compensation for the actions of the village chief. She goes to the city, talks with lawyers and bureaucrats, but with little avail (according to *her own* standards of success, which we are not really clear about, throughout the whole movie; we actually only get to understand her frustration at not finding a proper resolution).³ And just about when reciprocal demands appear to having been compensated somehow (as the village chief eventually helps *Qiu Ju*, when she goes into labor, to arrive at the hospital, where she safely gives birth), formal law reappears from the background and swiftly decides to take matters into its own hands, finally – *Qiu Ju*'s husband has a broken rib and, thus, the village chief ought to go to jail. The movie ends with *Qiu Ju*'s attempts to stop the police officers from executing law's resolution and take the chief to jail. She went to the city, talked to lawyers and bureaucrats, appealed against official decisions and yet...that was still *not* what she wanted.

Perhaps access to justice is *not* really a waste of time, in it and of itself, then. And the problem is not really that it is a second (or a third, or fourth) best option, if that, either. Perhaps access to justice is just a time-consuming activity, with radical evaluative

³ Part of this depends, of course, on how far removed the viewer is from what he sees on the screen, in terms of fluency in the specific cultural codes employed by the movie. As the distance narrows, I would expect that *Qiu Ju*'s untold aspirations might become clearer and more transparent. The point, which I try to make in the following, still stands, however: the village chief going to jail is, or it would appear as, the *expected* result of going to the big city and talk with lawyers, and bureaucrats and all the rest of what she did. So, it isn't just *us* – viewers several steps, and thousands of miles, removed from the social context at hand – who do not understand what *Qiu Ju* is doing. She isn't very clear herself either.

uncertainties about expected outcomes.⁴ And this much, of course, increases the probability that access to justice in the *real* world will be a waste of time. It isn't really that *Qiu Ju* was *just* wasting her time, while investing so many of her resources in pursuing her claims against the chief (although it is hard *not* to conclude that she was doing that too). She didn't really know what she was doing either. *And*, formal authorities had very little clue as well, as they re-appear from nowhere, imposing an altogether obtuse response to her (uncertain) demands.

When I first got interested in the theme of access to justice, I came across an important two-parts article by Frank Michelman on the constitutionality of access fees, in US constitutional law. Commenting on a very ambiguous thread in the US Supreme Court's decisions on access fees, Michelman makes the following observation:

There are times [...] when courts seem to be acting as though it were an elevated form of judicial artistry to help us block out troublesome moral riddles – an effect which a court can achieve by studiously refusing to name a right a right, to name an injustice an injustice. Now is that the judiciary's mission: moral anaesthesiology? Or is it not a high judicial function, when the context is appropriately judicial and the legal merits are tolerably clear, to confront us with – not to save us from – the riddles that prick our consciences?⁵

In many ways, Michelman's observation can both be explained by, as well as explain, the two disconcerting comments on access to justice, and their figurative representation in *Qiu Ju*'s conflicting evaluations. The reason why moral anesthesiology is attractive at all here is precisely that access to justice might very well waste much of a lot of people's

⁴ Again, there are many other valuable things in the world, which display this feature. And, again, medical care is another big example. My intuition is that access to justice is a good, which lends itself to even *more* uncertain evaluations than medical care. (Kenneth Arrow's intuition on the matter was otherwise, see K. Arrow, K., *Uncertainty and the Welfare Economic of Medical Care*, 5 AMERICAN ECONOMIC REVIEW 141 (1963)).

⁵ See Michelman, F., *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights – Part II*, DUKE LAW JOURNAL 527 (1974), at 568.

time – that is, access to justice involves a significant number of costly, burdensome and socially harmful activities. And yet it isn't hard at all to empathize with the frustration of someone's attempts to find proper resolution to her predicaments with others, even without being altogether too clear on what a 'proper resolution' could amount to. That is, it isn't difficult at all to empathize with *Qiu Ju*, notwithstanding the fact that we might be very much confused about what she actually wanted and expected. But this means, also, that as we move around the field of access to justice, we are bound to encounter 'riddles with which to prick our moral consciences' at almost every turn. And it is this apparent ineliminability of morally pricking riddles, which aggravates our sense of frustration, and makes moral anesthesiology very attractive in turns.

The strategy, which the essay designed in order to come up with a reasonable conception of equality in access to justice, is consciously thought of as a way to give 'riddles with which to prick our moral consciences' their due, *without* having to resort to moral anesthesiology, whenever we need to work around them in practical action.

Part I of this essay explores three interpretations of equal access to justice, which, I argue, most actual accounts of access to justice appeal to, when they describe the field, or evaluate practical action in it. What are people claiming, when they demand equal access to justice? And, relatedly, what do they mean by that?

They claim three things especially, I argue: 1) they demand equal legal protection – that is, they demand a particular *fit* between the 'rules as announced', and 'rules as applied in concrete cases'; 2) they demand equal standing in open court – that is, they demand a particular *status* (a set of institutional powers and capacities), and being able to *stand* before others in particular ways, as they make specific claims onto them, or resist

to theirs; and 3) they demand agency in legal affairs – that is, they demand the protection of their ability to use laws in ways, and in order to achieve goals, which they find valuable.

Each one of such interpretations has impressive potential in organizing our thoughts, whenever we demand equality in access to justice. But we also need a way to integrate their insights, and identify their ambiguities, within a coherent framework. This is where a capabilities approach begins to help. A CA, I argue, allows us to express the thought that, when we demand equal access to justice, we typically demand a particular outcome (this is what the idea of ‘equal legal protection’ is meant to express), while, at the same time, giving salience to the observation that what we demand is an outcome, which is *arrived at* in particular ways – namely, by authorizing and protecting *both* people’s capacities to stand as equals as they make, and resist to, claims to, and by, others, *as well as* people’s abilities to use and take advantage of laws, as they try to achieve valuable goals.

This kind of analysis centrally involves conceptual elucidations and meditations on public meanings and intuitions, but it *also* relies on empirical assumptions. The analysis is not *just* about words and their meanings. It heavily relies, also, on how these words are actually *hooked up* with empirical social reality. And here again a CA might be particularly helpful to the access to justice scholar and practitioner, because it helps him, I argue, to discern relevant phenomena, and provide qualitatively rich descriptions of them.

Indeed, the understanding of moral riddles requires qualitatively rich descriptions of human social interactions. Riddles described by lofty and formal language do not call

for any kind of moral anesthesiology (at best, they take part in it): they are a mere intellectual curiosity with little practical weight. But qualitatively rich descriptions are not enough. We also need normative interpretations of the relevant social phenomena.

Part I thus presents four historical arguments in access to justice, and which understand equal access to justice as, respectively, 1) implied by the ideal of government by consent, 2) as a requirement of fair adversarial procedures of adjudication, 3) as a welfare right, and 4) as an essential component of the rule of law.

Each of the received approaches, I argue, provides one with important insights on how to practically move around the field. The understanding of access to justice as implied by the ideal of government consent helps us see the deep connections between the legitimacy of a legal order and equal access to justice itself. The understanding of equal access to justice as a requirement of fair adversarial procedures of adjudication makes one see, through the ideal of equal standing in public confrontations, the close connection between access to justice and the ideal of equality in social relations. The inclusion of equal access to justice within the larger problem of making welfare rights justiciable allows one to point to the larger instrumentalities of access to justice itself, as a mechanism (among others) that should work for the entrenchment and protection of fair distributions within a community. The invocation of the principles of the rule of law points to the instrumentalities of access to justice in giving practical value and purpose to formal laws, seen as grounds for the formation of convergent expectations and for expressing criticism among citizens.

At this time, then, we are very well equipped to identify ‘riddles with which to prick our moral consciences’. We have four independent arguments, which point in

different directions for a justification of equal access to justice. And we have a solid conceptual apparatus, derived both from conceptual analysis itself, as well as from empirical observation, with which we should be able to identify, describe and then discuss as many riddles as we may wish to find.

What we need at this point then is to search for a moral interest, which should be suitably general and abstract, in order to track common traits among the otherwise different reasonable arguments in equal access to justice. It should also explain why we are interested in all of them at all, prune their inconsistencies out, and then integrate them within a solid theoretical edifice. This is where Part II begins.

And again, a CA is of particular help here. By providing a relevant evaluative description of the human animal condition (as a social, and needy being, which responds to reasons of various kinds), it allows us to identify, I argue, a human function, which we all have a moral interest in cultivating and defending (in ourselves, just as much as in others) – namely, the ability to disagree with others, without compromising the reasons which justify social cooperation. We are morally interested in equal access to justice, I argue, because we are morally interested in defending and protecting this human function (in ourselves, just as much as in others).

In order to explain and signal the thought that access to justice (or, at any rate, actual recourse to a good portion of the specific institutions which are designed to realize it in practice, like law, litigation, judges and lawyers) is, often times, a ‘second-best’, costly, and burdensome option, I propose a formulation of the duty, which is correlative to such moral interest, and which I call the duty to, at times and provisionally, pause, cool down and listen.

But this is *not* enough to solve moral riddles; nor is it enough to sensibly get around them in practical action. A moral interest, and a correlative moral duty, which are abstract and general enough to effectively *count* in different practical arguments are bound to be *too* general and abstract to allow for direct and immediate application in *any* practical case in particular. What we gain in generality, we lose in directedness and resolute deliberation.

This is why I propose, also, three political principles, which are meant to provide institutional specifications of the moral interest (and its correlative duty) in equal access to justice. I understand these principles as intellectual tools for practical deliberation, whose value is thus dependent on their ability to guide practical deliberation in controversial matters – That is, they are meant to provide answers to a host of practical questions in the relative field. What should we be interested in, when we demand equal access to justice for all? And, on which grounds should we evaluate arguments in the field? How should we evaluate the impact of reform?

The three principles, I argue, tell us that, whenever we demand equal access to justice for all, we should be interested in protecting democratic equality – that is, we should be interested in 1) abolishing hierarchical relations in social cooperation; and, when this is not possible, we should be interested in limiting the scope, grounds and content of such relations; And we also should be interested in 2) strengthening the epistemic capacity of public institutions; and in 3) expressing a democratic culture in dispute resolution. Put differently, valuable institutional reforms in access to justice are those, which protect and defend democratic equality. And, as such, they are reforms, which abolish hierarchical relations in social cooperation, or limit their scope, grounds

and content; they strengthen the epistemic capacity of public institutions, and express a democratic culture in dispute resolution.

At this point, we have a descriptive and conceptual apparatus, a moral interest, and three political principles, which jointly make a claim on practical guidance in the domain of equal access to justice. But they are still mere theoretical hypotheses. They have a claim on practical guidance because they allow for a sensible organization of reasonable understandings delivered by tradition. They still need practical testing, however – that is, we need now to observe the consequences, which follow from *acting on* them in practical matters, and evaluate whether we can conscientiously aspire to their realization, or at least live with them, or not.

The kind of practical testing which one can do in a book in political philosophy is not at all easy, but can be fairly straightforward: political philosophers can look closely at how people have historically argued and debated about concrete political cases, and then check to which concrete uses they can put their theoretical edifices. Do they provide sensible ways to reconstruct existing arguments, explain their logic and adjudicate among them? This is the task of Part III.

I look at four different, but related fields in access to justice, and test the theory proposed here on several different issues. First, chapter 12 discusses the long line of precedents, which eventually conspired to achieve (at least partial) recognitions of the right to counsel, in the US Constitutions and the European Convention on Human Rights. The point of this discussion is to test the value and reach of a CA (and its conceptual apparatus) to steer *both* judicial decision-making, as well as political activism and institutional design, in valuable directions. I conclude the section by criticizing different

models for the delivery of legal aid, and propose a way to integrate their potential for reform in a coherent (albeit still tentative) framework.

Then, chapter 13 discusses legitimacy problems with group litigation and proposes one way to affect a reconciliation between the value of protecting individual choice and empowerment and the need to impose stringent limitations to personal control and unfettered discretion in litigation choices. We can justify limitations to personal control and unfettered discretion in litigation choices *for the sake of* protecting individual choice and empowerment, I argue, by guaranteeing that the combined capabilities of individual users are adequate to the task of protecting their social equality, of increasing the epistemic capacities of public institutions, and of expressing a democratic culture in dispute resolution.

Chapter 14 analyzes the value of publicity in adjudication, by debating the legitimacy of confidential settlements. I argue here that the legitimacy of confidential settlements depends on the nature of the issues, which are litigated and, in particular, on whether the dispute itself can be reasonably thought of as a one-shot affair between the two parties, or can be included within a wider social pattern.

Finally, chapter 15 analyzes the complex interactions between legal and extra-legal activism in one important moment of the American civil rights movement (the Selma march in 1965), and speculates on the different practical attitudes, which due process might be able to call out in its participants, within the larger context of reformist social movements.

BIBLIOGRAPHY

ABEL-SMITH, BRIAN & ROBERT STEVENS, *LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750 – 1965* (1967);

Abel, R., *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 *LAW AND POLICY QUARTERLY* 51, (1979);

ABEL, R.L. (ED.), *THE POLITICS OF INFORMAL JUSTICE* (1988);

Abel, R.L., *State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION* (R. GRANFIELD & L. MATHER EDS., 2009): 295–307;

Abel., L., *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 *TEMP. POL. & CIV. R. L. REV.* 527 (2006);

Abram, M., *Access to the Judicial Process*, in 6 *GEORGIA LAW REVIEW* 247 (1972);

ABRAMOVICH, VICTOR & CHRISTIAN COURTIS, *LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES* (2004);

Abramovich, Victor, *Acceso a la justicia y nuevas formas de participación en la esfera política*, 9 *REVISTA ESTUDIOS SOCIO-JURIDICOS* 9 (2007);

Albiston, C. R. & L. B. Nielsen, *Funding the Cause: How Public Interest Law Organization Fund their Activities and Why it Matters for Social Change*, 39 *LAW & SOCIAL INQUIRY* 1: 62 – 95 (2014);

Albiston, Catherine R. & Rebecca Sandefur, *Expanding the Empirical Study of Access to Justice*, *WISC. L. REV.* 101 (2013);

ALKIRE, S., *VALUING FREEDOMS: SEN'S CAPABILITY APPROACH AND POVERTY REDUCTION* (2002);

Anderson, E., *Justifying the capabilities approach to justice*, in *MEASURING JUSTICE: PRIMARY GOODS AND CAPABILITIES* (H. BRIGHOUSE AND I. ROBEYNS EDS., 2010);

Anderson, E., *What is the Point of Equality?*, 109 *ETHICS* 287 (1999);

Andrews, Neil, *A New Procedural Code For England, Party control “Going, Going, Gone”*, in *CIVIL JUSTICE QUARTERLY* 120 (2000);

- Arrow, K., *Uncertainty and the Welfare Economic of Medical Care*, 5 AMERICAN ECONOMIC REVIEW 943 (1963);
- BARSOTTI, VITTORIA, L'ARTE DI TACERE. STRUMENTI E TECNICHE DI NON DECISIONE DELLA CORTE SUPREMA DEGLI STATI UNITI (1999);
- Barton, B., Bibas, S.; *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012);
- BASS, JACK, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS (1993);
- Bass, Jack, *The Selma March and the Judge Who Made It Happen*, 67 ALABAMA L. REV. 537 (2015);
- BEANEY, W., THE RIGHT TO COUNSEL IN AMERICAN COURT (1955);
- Bell, Derrick A., Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976);
- Bergallo, Paola, *Apuntes sobre justicia y experimentalismo en los remedios frente al litigio de derecho publico*, 2 JURISP. ARG. 3 (2006);
- Bone, Robert G. *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 509–10 (2003);
- Bone, Robert G., *Class Action*, in PROCEDURAL LAW AND ECONOMICS 67 (CHRIS WILLIAM SANCHIRICO ED., 2d ed. 2012);
- Bone, Robert G., *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995);
- Bone, Robert G., *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319 (2008);
- Bone, Robert G., *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989);
- Bone, Robert G., *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329 (2012);
- Bone, Robert G., *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990);

- Bone, Robert G., *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011 (2010);
- Bone, Robert G., *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992);
- Bone, Robert G., *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577 (2011);
- Bone, Robert G., *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097 (2013);
- BUMILLER, K., *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988);
- Burbank, Stephen B., *Procedure and Pragmatism*, in DEBATIENDO CON TARUFFO, JORDI FERRER & CARMEN VAZQUEZ (EDS.), (2008);
- Burbank, Stephen B., *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982);
- Cabraser, Elizabeth J., *Enforcing the Social Compact Through Representative Litigation*, 33 CONN. L. REV. 1239 (2001);
- Cabraser, Elizabeth J., *The Essentials of Democratic Mass Litigation*, 45 COLUM. J.L. & SOC. PROBS. 499 (2012);
- Cabraser, Elizabeth J., *The Procedural Vision of Arthur R. Miller: A Practitioner's Tribute*, 90 OR. L. REV. 929 (2012);
- Cappalli, Richard B. & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217 (1992);
- Cappelletti, M., *Alternative dispute resolution processes within the framework of the world-wide access to justice movement*, 56 THE MODERN L. REV. 283 (1993)
- CAPPELLETTI, M. & B. GARTH, *Access to Justice: the Worldwide movement to Make Rights Effective – a General Report*, in ACCESS TO JUSTICE: A WORLD SURVEY, VOL. 1 (MAURO CAPPELLETTI, BRYANT GARTH eds., 1978)
- CAPPELLETTI, M., J. GORDLEY, & E. JOHNSON (EDS.), *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (1975);
- Cappelletti, Mauro, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, in II ACCESS TO JUSTICE: PROMISING INSTITUTIONS 769 (M. CAPPELLETTI & J. WEISNER EDS.) (1979);
- Carfield, M., *Enhancing Poor People's Capabilities Through the Rule of Law: Creating an Access to Justice Index*, in 83 WASH. U. L. Q. 339 (2005);

- Chamblee Burch, Elizabeth, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87 (2011);
- CHERRY, MYSHIA & FLANAGAN, OWEN (ED.), *THE MORAL PSYCHOLOGY OF ANGER* (2017);
- Clermont, Kevin M. & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 129 n.54 (2002);
- Coffee, John C. Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. LAW REV. 370 (2000);
- Coffee, John C. Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995);
- Coffee, John C. Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987);
- Cohn, Sherman L., *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966);
- Courtis, Christian, *Tutela judicial efectiva y afectaciones colectivas de derechos humanos*, 2 JURISP. ARG. 1215 (2006);
- CROCKER, D. A., *ETHICS OF GLOBAL DEVELOPMENT: AGENCY, CAPABILITY AND DELIBERATIVE DEMOCRACY* (2008);
- Cummings, S. & D. Rhode, *Public Interest Litigation. Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 604 (2009);
- Cummings, S. & D. Rhode, *Public Interest Litigation. Insights from theory and practice*, 36 FORDHAM URB. L.J. 604 (2009);
- Cummings, S., *The Politics of Pro Bono*, ULCA LAW REVIEW 51:1–149 (2004);
- Cummings, S., *The Pursuit of Legal Rights—And Beyond*, UCLA LAW REVIEW 59: 506–49 (2012);
- Damaška, M., *Structures of Authority and Comparative Criminal Procedure*, in 84 YALE L. JOURNAL 480 (1975);
- DAMAŠKA, MIRJAN, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986);
- Dana, David A., *Adequacy of Representation After Stephenson: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279 (2006);

- Davis, Mary J., *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157 (1998);
- Denti, V., *Patrocinio dei non abbienti e accesso alla giustizia: problemi e prospettive di riforma*, FORO ITALIANO, V. (1980);
- Dixon, R., Nussbaum, M., *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 CORNELL LAW REVIEW 558 (2012);
- DWORKIN, RONALD, A MATTER OF PRINCIPLE (1985);
- Effron, Robin J., *The Shadow Rules of Joinder*, 100 GEO. L.J. 759 (2012);
- Eisenberg, Theodor, *The Need for a National Civil Justice Service of Incidence and Claiming Behavior*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICAN (Samuel Estreicher & Joy Radice ed., 2016);
- ELIANTONIO, MARIOLINA, C. W. BACKES, C. H. VAN RHEE, T. N. B. M. SPRONKEN & A. BERLEE (EDS.), STANDING UP FOR YOUR RIGHT(S) IN EUROPE. A COMPARATIVE ON LEGAL STANDING BEFORE THE EU AND MEMBER STATES' COURTS (2013);
- ENGEL, D. & F. MUNGER, RIGHTS OF INCLUSION (2003);
- Engler, E., *Turner v. Rogers and the Essential Role of Courts in Delivering Access to Justice*, in 7 HARVARD LAW & POLICY REVIEW 31 (2013);
- Epstein, Richard A., *Class Actions: Aggregation, Amplification, and Distortion*, U. CHI. LEGAL F. 475 (2003);
- Erbsen, Allan, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1059–67 (2005);
- Fallon, Eldon E., *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014);
- Fallon, Eldon E., Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008);
- Fanlo Cortés, I., *Poverty and Access to Justice: Rethinking Legal Aid Models*, in LAW, POLITICS AND MORALITY: EUROPEAN PERSPECTIVES III (J. Ferrer Beltrán & Susanna Pozzolo eds., 2007): 205 – 228;
- Farhang, S., *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AMERICAN JOURNAL OF POLITICAL SCIENCE 821 (2008);
- Fiss, Owen M., *Against Settlement*, 93 YALE L.J. 1073 (1984);

- Fiss, O., *The History of an Idea*, 78 FORDHAM LAW REVIEW 101 (2009);
- Frankel, E., *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE FORUM FOR LAW AND SOCIAL CHANGE 98 (2011);
- FRANKFURTER, FELIX & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1927);
- FREDMAN, SANDRA, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* (2008);
- Fuller, Lon L., *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978);
- Galanter, M., *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URBAN LAW JOURNAL 115 (2010);
- Gargarella, Roberto, *La dificultad de defender el control judicial de las leyes*, 6 ISONOMIA 55 (1997);
- GARGARELLA, ROBERTO, *LA JUSTICIA FRENTE AL GOBIERNO. SOBRE EL CHARACTER CONTRAMAYORITARIO DEL PODER JUDICIAL* (1996);
- Garrett, Brandon L., *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593 (2012);
- GARTH, B., *NEIGHBOURHOOD LAW FIRM FOR THE POOR* (1980);
- GARROW, DAVID J., *PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965* (1978);
- GIANNINI, LEANDRO J., *EL CERTIORARI. LA JURISDICCIÓN DISCRECIONAL DE LAS CORTES SUPREMAS* (2016);
- GIANNINI, LEANDRO, *LA TUTELA COLECTIVA DE DERECHOS INDIVIDUALES HOMOGENÉOS* (2007);
- Gilles, Myriam & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012);
- Gilles, Myriam, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005);

- Ginsburg, Tom & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31 (2006);
- GIUSSANI, ANDREA, STUDI SULLE CLASS ACTIONS (1996);
- GLENDON, MARY ANN, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991);
- GOFFMAN, EARVING, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963);
- GRANFIELD R. & L. MATHER (EDS.), PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION (2009);
- Hadfield, Gillian K, *Don't Forget the Lawyers: Legal Human Capital and the Role of Lawyers in Supporting the Rule of Law*, 55 DEPAUL L. REV. 401 (2007);
- Hadfield, Gillian K, *Exploring Economic and Democratic Theories of Litigation: Differences between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275 (2005);
- Hadfield, Gillian K, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORD. URB. L. J. 129 (2010);
- Hadfield, Gillian K, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008);
- Hadfield, Gillian K, *The Numbers Don't Lie: Why It's Time for Lawyers and Judges to Reduce the Regulatory Barriers to the Provision of Legal Help*, in LIMAN AT FIFTEEN: ACCESSING JUSTICE, RATIONING LAW (Yale Law School) (2011);
- Hadfield, Gillian K, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000);
- Hadfield, Gillian K, *Where Have All the Trials Gone? Settlements, Non-trial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. OF EMP. L. STUD. 705 (2004);
- Hadfield, Gillian K. & Deborah Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HAST. L. J. 1191 (2016);
- Hadfield, Gillian K. & Jaime Heine, *Like in the Law-Thick World: Legal Resources for Ordinary Americans*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICAN (SAMUEL ESTREICHER & JOY RADICE ED., 2016);

- Hadfield, Gillian K., *The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law*, 38 INTER. REV. OF LAW AND ECON. 43 (2014);
- HARSAGI V., & C. H. V. RHEE (EDS.), MULTI-PARTY REDRESS MECHANISMS IN EUROPE: SQUEAKING MICE? (2014);
- Hay, Bruce & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1390–93 (2000);
- Hay, Bruce L., *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997);
- HAYEK, F. A., THE ROAD TO SERFDOM (1944);
- Hazard, Geoffrey C., Jr., John L. Gedid and Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PENN. L. REV. 1849 (1998);
- HENSLER DR, C. HODGES AND I. TZANKOVA (EDS), CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION (2016);
- Hilbink, T. M., “You Know the Type . . .”: Categories of Cause Lawyering, LAW & SOCIAL INQUIRY 29: 657–98 (2004);
- HODGES, CHRISTOPHER (ED.), THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE APPROACH (2010);
- Hodges, Christopher & N. Creutzfeldt, *Transformations in Public and Private Enforcement*, in THE TRANSFORMATION OF ENFORCEMENT (H-W MICKLITZ AND A. WECHSLER EDS) (2016);
- Hodges, Christopher, *Collective Actions*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (P. Cane and H. Kritzer eds.) (2010);
- Hodges, Christopher, *Collective Redress in Europe: The New Model*, 7 CIVIL JUSTICE QUARTERLY 370 (2010);
- HODGES, CHRISTOPHER, J. PEYSNER & A. NURSE, LITIGATION FUNDING. STATUS AND ISSUES (2012);
- Hodges, Christopher, *Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress*, in MASS JUSTICE (J. STEELE AND W. VAN BOOM EDS) (2011);
- Hodges, Christopher, *Public and Private Enforcement: The Practical Implications for Policy Architecture*, in THE FOUNDATIONS OF EUROPEAN PRIVATE LAW (R. BROWNSWORD, H. MICKLITZ, L. NIGLIA & S. WEATHERILL EDS) (2011);

- HODGES, CHRISTOPHER, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS: A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE (2008);
- Hodges, Christopher, *US Class Actions: Promise and Reality*, in THE TRANSFORMATION OF ENFORCEMENT (H-W MICKLITZ AND A. WECHSLER EDS) (2016);
- Hornstein, R., *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057 (2010);
- Houseman, A. W., *Legal Aid History*, in POVERTY LAW MANUAL FOR THE NEW LAWYER (2002), 18–25’
- Issacharoff, Samuel, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997);
- Issacharoff, Samuel, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337;
- KAGAN, ROBERT A., ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001);
- Kalven, Harry & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941);
- Kaplan, Benjamin, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497 (1969);
- Kaplan, Benjamin, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967);
- KAPLOW, LOUIS & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002);
- Klonoff, Robert H., *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013);
- Koch, Harald, *Non-Class Group Litigation under EU and German Law*, 11 DUKE J. COMP. & INT’L L. 355 (2001);
- Lahav, Alexandra D., *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939 (2011);
- Lahav, Alexandra, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65 (2003);
- Langbein, J., *The German Advantage in Civil Proceedings*, in 52 THE UNIVERSITY OF CHICAGO LAW REVIEW 823 (1985);

Legal Services Corporation from the 1960s through the 1990s, 17 SAINT LOUIS UNIVERSITY PUBLIC LAW
LUBAN, DAVID, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988);

MACHADO DE CASTRO, A.L., C.F. ALVES, D. ESTEVES & F. R. ALVES SILVA, *ACCESS TO JUSTICE IN BRAZIL* (2017);

Malveaux, Suzette M., *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COL. 34 (2011);

Marcus, David, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011);

Marcus, David, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587 (2013);

Marcus, Richard L., *Public Law Litigation and Legal Scholarship*, 21 U. MICH J.L. REFORM 647 (1988);

Marcus, Richard, ‘*American Exceptionalism*’ in *Goals for Civil Litigation*, in GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS 123 (ALAN UZELAC ED., 2014);

Mashaw, J. (1981). *Administrative Due Process: The Quest for a Dignitary Theory*, 1981, in *Faculty Scholarship Series*. Paper 1152, http://digitalcommons.law.yale.edu/fss_papers/1152.

MASHAW, JERRY L., *DUE PROCESS IN THE ADMINISTRATIVE STATE* 189–99 (1985);

Mashaw, Jerry L., *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976);

MATHEWS E.J.T. & OULTON A.D.M, *LEGAL AID AND ADVICE* (1971), Chapter 2 especially (Act on the eleventh year of King Henry the Seventh);

Mattei, U., *Access to Justice: a Renewed Global Issue?*, in 11 ELECTRONIC JOURNAL OF EUROPEAN LAW, (2007);

McCann, Michael & William Haltom, *Review Essay, Ordinary Heroes vs. Failed Lawyers—Public Interest Litigation in Erin Brockovich and Other Contemporary Films*, 33 LAW & SOC. INQUIRY 1045 (2008);

- Menkel-Meadow, Carrie, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report-Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994);
- Miller, Arthur, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the Class Action Problem*, 92 HARVARD L. REV. 664 (1979);
- Miller, Geoffrey P., *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, U. CHI. LEGAL F. 581 (2003);
- Moore, James William & Marcus Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555 (1938);
- Mullenix, Linda S., *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511 (2013);
- Mullenix, Linda S., *Competing values: preserving litigant autonomy in an age of collective redress*, 64 DEPAUL L. REV. 601 (2014);
- Mullenix, Linda S., *Ending the Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L. J. 399 (2014);
- Mullenix, Linda S., *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, U. CHI. LEGAL F. 177 (2003);
- NAGAREDA RICHARD A., *MASS TORTS IN A WORLD OF SETTLEMENT* (2007) (conceiving the class action device as a form of private governance, and thus class action litigation, and its results, as a mode of administrative regulation);
- Nagareda, Richard A., *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287 (2003);
- Nagareda, Richard A., *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872 (2006);
- Nagareda, Richard A., *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603 (2008);
- Nagareda, Richard A., *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009);
- Nagareda, Richard A., *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149 (2003);
- Nordh, Roberth, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms and a Forthcoming Proposal*, 11 DUKE J. COMP. & INT'L L. 381 (2001);

- NUSSBAUM, MARTHA, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY AND JUSTICE (2016);
- Nussbaum, M., *Capabilities and Human Rights*, 66 FORDHAM LAW REVIEW 289 (1997);
- Nussbaum, M., *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECONOMICS 33 (2003);
- Nussbaum, M., *Constitutions and capabilities: "Perception" against Lofty Formalism*, 121 HARVARD LAW REVIEW 4 (2007);
- NUSSBAUM, M., FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006);
- NUSSBAUM, M., WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000);
- Ossei-Owusu, S., *A People's History of Legal Aid: A Brief Sketch*, in ROUTLEDGE HANDBOOK ON POVERTY IN THE UNITED STATES (2014);
- OTEIZA, EDUARDO (ED), PROCESOS COLECTIVOS (2006);
- Pastore, C., *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006);
- Patton, W., *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L. J. 195 (1996);
- PLEASENCE, P., BALMER, N., BUCK, A., CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE (2006).
- Pleasence, P., Balmer, N., Buck, A., O'Grady, Genn, H.. *Multiple justiciable problems: common clusters and their social and demographic indicators*, in 1 J. EMPIR. LEGAL STUD. 301 (2011);
- Pleasence, P., Balmer, N., Smith, Patel, *Mounting Problems: Further Evidence of the social, economic, health consequences of civil justice problems*, in TRANSFORMING LIVES: LAW AND SOCIAL PROBLEMS (PLEASENCE, P., BUCK, A., BALMER, N. eds., 2011);
- Pogge, T., *Can the Capability Approach be Justified?*, in 2 PHILOSOPHICAL TOPICS 167 (2002);
- POSNER, ERIC, THE TWILIGHT OF HUMAN RIGHTS LAW (2014);

- Quigley, William P., *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the*
- RAZ, J., *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY*, (1979);
- Redish, Martin H. & Andrianna D. Kastanek, *Settlement Class Actions, the Case or Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006);
- Redish, Martin H. & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753 (2007);
- Redish, Martin H. & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573 (2007);
- Redish, Martin H. & William J. Katt, *Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877 (2009);
- Redish, Martin H., *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, U. CHI. LEGAL F. 71 (2003);
- Redish, Martin H., *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 DEF. COUNS. J. 18 (1996);
- Redish, Martin H., *The Need for Jurisdictional and Structural Class Action Reform*, 32 ENVTL. L. REP. 10 (2002);
- REDISH, MARTIN H., *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009);
- REGAN, F. ET AL (EDS.), *THE TRANSFORMATION OF LEGAL AID. COMPARATIVE AND HISTORICAL STUDIES* (1999);
- RESNIK, J., CURTIS, D., *REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011);
- Resnik, J., *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011);
- RHODE, D., *ACCESS TO JUSTICE* (2004);
- Robeyns, I. *The Capability Approach: A Theoretical Survey*, in 1 JOURNAL OF HUMAN DEVELOPMENT 93 (2005);
- Rosenberg, David, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L. J. 561 (1987);

- Rosenberg, David, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002);
- Rosenberg, David, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002);
- Rosenberg, David, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393 (2000);
- Rosenberg, David, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695 (1989);
- Rosenberg, David, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849 (1984);
- Rubenstein, William B., *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790 (2007);
- Rubenstein, William B., *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND L. REV. 2129 (2004);
- Rutherglen, George, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24 (2012);
- Sabel, Charles F. & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARVARD L. REV. 1015 (2004);
- SALGADO, JOSÉ MARIA, TUTELA INDIVIDUAL HOMOGÉNEA, CONFLICTOS, DERECHOS Y PRETENSIONES COLECTIVAS (2011);
- Sandefur, Rebecca, *Access to Civil Justice and Race, Class and Gender Inequality*, 34 *Annual Review of Sociology* 339 (2008);
- Sandefur, Rebecca, *Access to Justice: Classical Approaches and New Directions*, in ACCESS TO JUSTICE (SANDEFUR, REBECCA ED., 2009);
- SANDEFUR, REBECCA, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (2014);
- SCHUCK, PETER H., AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986);
- Sen, A., *Development as Capability Expansion*, 19 JOURNAL OF DEVELOPMENT PLANNING 41, (1989);
- SEN, A., DEVELOPMENT AS FREEDOM (1999);

- Sen, A., *Elements of a Theory of Human Rights*, 32 PHILOSOPHY AND PUBLIC AFFAIRS 315 (2003);
- Sen, A., *Equality of What?*, in TANNER LECTURES ON HUMAN VALUES (MCMURRIN ED., 1980);
- Sen, A., THE IDEA OF JUSTICE (2009);
- Shapiro, David L., *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998);
- SHAVELL, STEVEN, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987);
- Silbey, S., *After Legal Consciousness*, 1 ANNU. REV. LAW. SOC. SCI. 323 (2005);
- SMITH, REGINALD H., JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR (1919),
- Solum, Lawrence B., *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004);
- Sternlight, Jean R., *Tsunami. AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012);
- Subrin, Stephen N., *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988);
- Subrin, Stephen N., *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998);
- Symposium, *A Right to a Lawyer? Momentum Grows*, CLEARINGHOUSE REV. 163 (2006);
- TARUFFO, MICHELE, IL PROCESSO CIVILE ADVERSARY NELL'ESPERIENZA NORDAMERICANA (1979);
- Taruffo, Michele, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405 (2001);
- Tidmarsh, Jay, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137 (2009);
- Trask, Andrew J., *Reactions to Wal-Mart v. Dukes: Litigation Strategy and Legal Change*, 62 DE PAUL L. REV. 791 (2013);
- TRIBE, LAURENCE H., AMERICAN CONSTITUTIONAL LAW (2D ED. 1988);
- TROCKER, N., ASSISTENZA LEGALE E GIUSTIZIA CIVILE (1979);

- Ucín, María C., *El rol de la Corte Suprema ante los procesos colectivos*, 1 REV. DER. PROC 329 (2009);
- VERBIC, FRANCISCO, PROCESOS COLECTIVOS (2007);
- Walter, Gerhard, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT'L L. 369 (2001);
- Watson, Garry D., *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269 (2001);
- Weinstein, Ian, *Access to Civil Justice in America: What Do We Know?*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICAN (Samuel Estreicher & Joy Radice ed., 2016);
- WEINSTEIN, JACK B., INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995);
- WILMOT – SMITH, FREDERICK, EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD (2019) (manuscript on file with the author);
- Wizner, S. & J. Aiken, *The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM LAW REVIEW: 997 – 1011 (2004);
- WOLFF, J., DE-SHALIT, A., DISADVANTAGE (2007);
- Woolley, Patrick, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917 (2010);
- YEAZELL, STEPHEN C., FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987);
- ZUCKERMAN, A. A. S. (ED.), CIVIL JUSTICE IN CRISIS (1999);
- Zuckerman, A., *New Rules for Costs Capping Orders: Feeding the Costs Litigation Frenzy?*, 28 CIVIL JUSTICE QUARTERLY 1 (2009);
- ZUCKERMAN, ADRIAN –CRANSTON, BRIAN (eds.), REFORM OF CIVIL PROCEDURE. ESSAYS ON ACCESS TO JUSTICE (1995).