DELIVERING LEGALITY: SOME PROPOSALS FOR THE DIRECTION OF RESEARCH

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This paper visualizes legal services as one of various alternative paths to delivering legality (i.e., the benefits which access to law confers upon actors). It challenges the assumption that deficiencies in access to law can be most effectively remedied by providing the services of lawyers. It suggests that in some cases there are excessive costs of delivering legality through the medium of legal services and that in other cases legal services are insufficient without some admixture of other factors. Among the alternatives considered are (a) modification of rules systems (e.g., no-fault schemes, simplified transactions); (b) modification of institutions for applying rules (e.g., departures from the court model by making institutions simple, mediative, proactive, private, etc.); (c) enhancement of the capabilities of the parties (personal competence, organizational capacity to utilize legal services, etc.). It is argued that lack of capability of parties poses the most fundamental barrier to access and that upgrading of party capability holds the greatest promise for promoting access to legality. Evidence is adduced for the proposition that organizational structure is a key factor in determining the ability of parties to utilize the legal system. Alternative ways in which various interests can attain the benefits of organization are considered. Finally, research possibilities associated with these themes are sketched.

I. WHAT ARE LEGAL SERVICES GOOD FOR?

In talking about "better meeting the needs of consumers of legal services," I begin by reminding myself that this inquiry must be put in the context of a broader inquiry: what are legal services good for? What is law good for? We are talking about access to whatever law is good for. Whatever these benefits are, we suspect that they are not delivered as regularly or equally as we would like. But before we devise ways to remedy this, let us attempt to specify the benefits that are being discussed.

Obviously, the presence of law confers benefits of various kinds on society as a whole—stability, channels for orderly change, perhaps efficient allocation. I shall put aside these collective benefits for the moment and concentrate on distributive benefits, those which access to law presumably bestows upon actors, individuals or groups, within the society. Among these are surely such things as

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- protection, security
- remedies for a variety of grievances and claims
- securing accountability of officials
- participation in decision making
- employment of facilitative rules to accomplish specific purposes
- provision of a framework for reliance
- feelings of justice, fairness.

For the sake of convenience I shall refer to these collectively as "legality," recognizing that the mix of goals will vary with the perceiver as well as with the actors.

Much discussion of legal services seems to proceed on the assumption that we can specify the instances in which these benefits are not realized and thus compile a list of unmet legal needs. There are reasons to suspect the adequacy of this way of visualizing the problem. In a recent article Leon Mayhew cautions us not to assume that there is a set of claims and problems "out there which fail to be met because legal services are unavailable" (1975: 404).

> Neither surveys of the experiences of the public nor the patterns of cases brought to legal agencies produce a particularly valid measure of the "legal needs" of the citizenry. Needs for legal services and opportunities for beneficial legal action cannot be enumerated as if they were so many diseases or injuries in need of treatment. Rather, we have a vast array of disputes, disorders, vulnerabilities, and wrongs which contain an enormous potential for generation of legal actions. Whether any given situation becomes defined as a "legal" problem, or, even if so defined, makes its way to an attorney or other agency for possible aid or redress, is a consequence of the social organization of the legal system and the organization of the larger society—including shifting currents of social ideology, the available legal machinery, and the channels for bringing perceived injustices to legal agencies.

We should be grateful to Mayhew for the insight that legal needs are not some Archimedean starting point against which we can measure the adequacy of legal services, but are themselves the product of, among other things, the way in which the legal system and legal services are organized. He reports, for example, that in a survey of metropolitan Detroit in 1967, "less than one percent of the women interviewed . . . said they had ever been discriminated against by reason of their sex" (1975: 404). This response, he concludes, might have been different had the respondents "applied a higher level of legal and sociological imagination to the question . . . but the necessary attitudes and information for seeing such discrimination were relatively undeveloped. Nor were there any well developed channels for routing cases of such discrimination to the attention of attorneys and legal agencies." So "legal need" in such a case (or in the case of family problems or consumer problems)

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is itself a reflex of the opportunities and resources provided by the legal system.

The "needs" to be filled, then, are not a primitive given, but an institutionally and ideologically contingent selection from a vast pool of amorphous "proto-claims." If needs are contingent, it is similarly problematic whether any given set of needs can best be filled by provision of legal services. We then must contemplate a more complex field in which many possible needs can be served by a variety of possible alternative paths to the benefits of legality.

There has been a tendency to assume that deficiencies in access to law can most effectively be met by more and better legal services, that legal services are the key missing resource. I want to suggest that this is not always the case; that we must compare the costs and benefits of alternative ways of delivering legality; and that (1) in some cases there are excessive costs to delivering legality through the medium of legal services, and (2) in some cases legal services are insufficient without some admixture of other factors.

II. ALTERNATIVE METHODS OF DELIVERING LEGALITY

I would like to address myself to some of the alternative strategies for performing the functions which, it has sometimes been assumed, could only be performed by legal services. For purposes of this analysis, I shall make some gross simplifying assumptions about the legal system (including the assumption that such a "system" can be meaningfully isolated from its social context). Let us think of that system as comprised of four elements or levels

- a body of authoritative normative learning—for short, RULES
- a set of institutional facilities (courts, administrative agencies, etc.) within which the normative learning is applied to specific cases—for short, INSTITUTIONS
- a body of persons with specialized skill in dealing with the above—for short, LEGAL SERVICES
- persons or groups with claims they might make to the courts with reference to the rules—for short, PARTIES.

Consider some of the ways in which each of these components might be transformed so as to enhance the access of individuals to the benefits of legality. (Of course, increasing the access of some may reduce the legality benefits of others, but we shall ignore this for the moment.)

(1) One may in various ways change legal services. One may seek changes in the recruitment, training, or ideology of the profession-

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als rendering such services; one may seek changes in the organization of the delivery of those services; and one may seek changes in the character of the services being offered. This is discussed extensively in the other papers in this collection. I want to talk not about legal services per se but about the way in which the other elements interact with legal services to amplify or diminish access possibilities

(2) Another way to improve access is to change the rules. Changes at the level of rules can provide greater (or reduced) access. For example, a shift from individuated "fault" rules to "no-fault" or "strict liability" can provide access by diminishing the complexity and technicality of a claim, eliminating the need for difficult showings of fact, employment of experts, use of professional advocates, etc. Again, access to facilitative rules might be provided by the development of preformed standardized packages ("canned transactions"), which can be used with little or no professional advice.[1] Most dramatically, rules can be changed to reduce the need for professional services by abandoning regulation of an area of activity.[2] These are examples of rule-changes that deliver legality by reducing the need for legal services. Most rule-change, it hardly needs to be said, is not of this kind. Typically, rule-change involves an increase in the complexity of the law and its remoteness from popular understanding and thus entails greater dependence on professionals to deliver its benefits.

Legal professionals have tended to overestimate the benefits that could be delivered through obtaining rule-changes from eminent institutions, especially from courts. A vast literature has documented the constantly rediscovered and never-quite-believed truths that judicial (or legislative) pronouncements do not change the world; that the benefits of such changes do not penetrate automatically and costlessly to their intended beneficiaries; that often they do not benefit the latter at all.[3] We have some notion of

1. These already exist, of course, in such matters as marriage, social security, etc. (Cf. the popular literature—e.g., Dacey (1965)—attempting to promote do-it-yourself in other areas). Halbach (1976:147) urges the development of

> standardized or partially standardized arrangements which private individuals can, if they wish, by a simple act of selection, utilize for transactions that now must be either individually tailored or go virtually unplanned. That is, the terms of potentially complicated, planned transactions, or major portions thereof, can be "prepackaged" in a series of statutory or other options rather than necessarily requiring the planning and drafting of elaborate, wholly individualized documents.

2. Proposals for deregulation abound, from dismantling administrative regulation of airlines to decriminalization of marijuana to elimination of estate administration. Cf. Halbach (1976:152).
3. Virtually the entire literature of the sociology of law might be cited on this point, but let me just mention a couple of outstanding case studies. See, e.g., Macaulay's (1966) study of the Dealer's Day in Court Act; Mayhew's

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why rule-changes produced by courts are particularly unlikely to be important sources of redistributive change (Friedman, 1967; Hazard, 1970; Galanter, 1974). Like everything else, favorable rules are resources and those who enjoy disproportionate shares of other resources tend also to reap the benefit of rules. The basic question is how to supply the resources that enable parties to secure the benefit of favorable rules.

(3) There is a great variety of proposals for providing greater access through changes at the level of institutions. These might be sorted out in a number of ways. Let me suggest some of the major categories in terms of the departures they make from the model of our ordinary courts.[4]

A. One classic response is to provide "small claims" courts—that is, courts with lower costs and simpler procedures, overcoming barriers of cost, locational accessibility, intimidation, and incomprehensibility.[5]

B. One might instead attempt to provide institutions that are mediative and conciliatory, rather than judgmental, imposing a win/lose outcome.[6]

C. One might attempt to change the character of courts by creating tribunals that are more "popular," responsive and participatory, less professional and alien, thereby reducing the cultural and psychological distance between tribunal and parties.[7]

D. One might instead encourage the development of tribunals in the private sector—such as the consumer forums operated by the dry cleaners, the carpet industry, and the home appliance manufacturers,[8] or by the Better Business Bureaus. More of these may be spawned by the new FTC

(1968) account of an antidiscrimination commission; Aubert's (1966) study of the Norwegian Housemaid Law; Randall's (1968) study of movie censorship, and the voluminous literature on prohibition, e.g., Sinclair (1964). Cf. Edelman (1967). Massell's (1968, 1974) study of Soviet attempts to reshape family life in Central Asia suggests that the success is not assured by willingness to resort to high levels of coercion. A useful summary of the extensive literature on the impact of United States Supreme Court decisions may be found in Wasby (1970). Some suggestive generalizations about the conditions conducive to the penetration of new law may be found in Grossman (1970:545) and Levine (1970:599 ff.).

4. I do not mention arbitration separately since it is an omnibus category that might refer to developments under almost all the headings discussed below.
5. For a critical analysis of the extensive small claims literature, see Yngvesson and Hennessey (1975).
6. Thus Nader and Singer (1976:318) call for "alternative forums to courts for resolving disputes between people whose relationships are ongoing, and thus subject to mediated solutions, reserving the courts for the one-shot, win-lose type of dispute. . . ." See also Danzig and Lowy (1975).
7. For a comparative survey of the emergence of such "popular tribunals," see Tiruchelvam (1973).
8. See, e.g., the thorough analysis of the now-defunct Carpet and Rug Industry Consumer Action Panel (CRICAP) by McDonald (1974).

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rules under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975.[9]

E. Related to these are various devices that are not tribunals but champions—something halfway between a dispute processing institution and an institution that provides representation. The ombudsman (Anderson, 1969; Rowat, 1973) and the media ombudsman[10] (Action Line, etc.) are the prime examples.

F. Coming full circle, one may think of supplying institutions that are more "active"—i.e., that depart from the passive umpire role of courts to take investigatory initiative[11] to secure, assemble, and present proof,[12] and to monitor performance, etc. Such proactive institutions would reduce the advantages conferred by the differential competence of parties or their representatives. Advocacy of an unrepresented interest may be built into the tribunal itself, as it was, for example, in early workman's compensation boards.[13] The possibilities here commend themselves to observers like Whitford and Kimball (1975), who suggest that effective processing of numerous complaints involving small amounts may require abandonment of adversary processes and substitution of inquisitorial adjudication.

(4) Finally, one may think of changes at the level of the parties. I submit that the fundamental problems of access to legality are to be found at this level and can best be visualized as problems of the capability of parties. That is, lack of capability poses the most fundamental barrier to access and, correspondingly, upgrading of

9. Pub. L. No. 93-637, 88 Stat. 2183 (Jan. 3, 1975).

10. Information on media ombudsmen (e.g., newspaper action lines or television action reporters) is rather slim. See Levine (1975); Singer (1973); Cerra (1976). For an interesting cross-cultural perspective, cf. Ramundo (1965).

11. This is an application of Donald Black's (1973:128) useful distinction between reactive mobilization of the legal process (i.e., on the basis of citizen complaint) and proactive mobilization (i.e., in which officials proceed on their own initiative).

12. Cf. Homburger (1970). For a description of more "active" courts, see Kaplan *et al.* (1958:1443). Of course, even among common law courts, passivity is relative and variable. Courts vary in the extent to which they exercise initiative for the purpose of actively protecting some class of vulnerable parties or developing a branch of the law.

13. Nonet (1969:79) describes the California Industrial Accident Commission:

> When the IAC in its early days assumed the responsibility of notifying the injured worker of his rights, of filing his application for him, of guiding him in all procedural steps, when its medical bureau checked the accuracy of his medical record and its referees conducted his case at the hearing, the injured employee was able to obtain his benefits at almost no cost and with minimal demands on his intelligence and capacities.

In the American setting, at least, such institutional activism seems unstable; over time institutions tend to approximate the more passive court model. See Nonet (1969: Chs. 6 and 7) and generally Bernstein (1955: Ch. 7) on the "judicialization" of administrative agencies.

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party capacity holds the greatest promise for promoting access to legality. Party capability includes a range of personal capacities which can be summed up in the term "competence": ability to perceive grievance, information about availability of remedies, psychic readiness to utilize them, ability to manage claims competently, seek and utilize appropriate help, etc. The personal competence notion has been set forth by Carlin and Howard (1965) and developed by Nonet (1969). Recently we have had a major development of this line of inquiry by Douglas Rosenthal (1974a). Beyond these personal competences, there is, I submit, a related set of structural factors—the size and organization of the party. It is on these that I shall focus.

III. UPGRADING PARTIES: THE STRUCTURAL ASPECT

I would like to approach the structural character of the parties by reflecting on our common sense view of legal services. In a recent talk the President of the new Legal Services Corporation describes its goal as insuring "that the poor receive the same quality and range of service that is provided to the rich" (Cramton, 1975: 1342). He suggests that "the alleged conflict between serving individual clients and engaging in 'law reform' " is illusory and "[b]asically the question is one of the quality, scope, and character of the representation to which a poor person is entitled" (1975: 1342). The answer, he continues, "is that the client is entitled to zealous and effective representation in the defense of his interests." In this seemingly simple formula, I submit, there lies concealed a series of complex and intractable questions which lead us to the centrality of the structural character of the parties. If we think of "the poor" as receiving the same "quality and range of service that is provided to the rich" we may have in mind the poor man writing his will or pursuing his automobile injury claim in the same manner that his rich counterpart does. Well enough—but we would, I think, be misreading the most central facts about the law in the contemporary United States. The most significant disparities in the use of law and in the provision of legal services, I submit, are not between rich and poor individuals but between individuals and organizations, (cf. Coleman, 1973). Legal contests (or noncontests) do not ordinarily take place between rich guys and poor guys. They take place, for the most part, between individuals and large organizations. The contract, grant, license, or other transaction—even the accident—is routine for the organization, which designs the transaction. If trouble develops, the occasion is typically one of a kind for the individual—it is an emergency or at the least a disruption of routine propelling him into an area of hazard and uncertainty. For the organization (usually a business or government unit), on the other

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hand, making (or defending against) such claims is typically a routine and recurrent activity.

The law game is so constructed that such recurrent organizational players enjoy strategic advantages over infrequent individual players. Briefly, the advantages might include

- ability to utilize advance intelligence, structure the next transaction, build a record, etc.
- ability to develop expertise and have ready access to specialists; economies of scale and low start-up costs for any case.
- opportunity to develop facilitative informal relations with institutional incumbents.
- ability to establish and maintain credibility as a combatant. (With no bargaining reputation to maintain, the one-time litigant has more difficulty in convincingly establishing commitments to his bargaining positions. See Ross, 1970: 156 ff.; Schelling, 1963: 22 ff., 41.)
- ability to play the odds. The larger the matter at issue looms for the one-timer, the more likely he is to avoid risk (i.e., minimize the probability of maximum loss). Assuming that the stakes are relatively smaller for recurrent litigants because of their greater size, they can adopt strategies calculated to maximize gain over a long series of cases, even where this involves the risk of maximum loss in some cases.
- ability to play for rules as well as immediate gains. It pays a recurrent litigant to expend resources in influencing the making of the relevant rules by lobbying, etc. Recurrent litigants can also play for rules in litigation itself, whereas a one-time litigant is unlikely to do so.

This last point deserves elaboration. There is a difference in what these two kinds of parties regard as a favorable outcome. Because his stakes in the immediate outcome are high and because by definition the one-timer is unconcerned with the outcome of similar litigation in the future, he will have little interest in that element of the outcome which might influence the disposition of the decision maker next time around. For the recurrent litigant, on the other hand, anything that will favorably influence the outcomes of future cases is a worthwhile result. The larger the stake for any player and the lower the probability of repeat play, the less likely that he will be concerned with the rules which govern future cases of this kind. Consider two parents contesting the custody of their only child, the prizefighter versus the IRS for tax arrears, the convict facing the death penalty. On the other hand, the player with a small stake in the present case and the prospect of a series of similar cases may be

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more interested in the state of the law (e.g., the IRS, the insurance company, the prosecutor).

Thus, if we analyze the outcomes of a case into a tangible component and a rule component, we may expect that in a given case, the one-timer will attempt to maximize tangible gain. But if the recurrent litigant is interested in maximizing his tangible gain in a series of cases, he may be willing to trade off tangible gain in any one case for rule gain (or to minimize rule loss). We would then expect recurrent litigants to "settle" cases where they expected unfavorable rule outcome. Since they expect to litigate again, such litigants can choose to litigate (or appeal) only those cases they regard as most likely to produce favorable rules. On the other hand, one-timers should be willing to trade off the possibility of making "good law" for tangible gain. Thus, we would expect the body of "precedent"—i.e., cases capable of influencing future outcomes—to be relatively skewed in favor of the recurrent litigant.

This skeletal account is given flesh in Macaulay's account of the litigation battle which followed the passage of the (automobile) "Dealer's Day in Court Act" or "Good Faith Act" (1966: 99-100):[14]

> [The manufacturers] . . . had an interest in having the [Good Faith Act] construed to provide standards for their field men's conduct. Moreover they had resources to devote to the battle. The amount of money involved might be major to a cancelled dealer, but few, if any cases involved a risk of significant liability to the manufacturers even if the dealer won. Thus the manufacturers could afford to fight as long as necessary to get favorable interpretations to set guidelines for the future. While dealers' attorneys might have to work on a contingent fee, the manufacturers already had their own large and competent legal staffs and could afford to hire trial and appellate specialists. . . . an attorney on a contingent fee can afford to invest only so much time in a particular case. Since the manufacturers were interested in guidelines for the future, they could afford to invest, for example, $40,000 worth of attorneys' time in a case they could have settled for $10,000. Moreover, there was the factor of experience. A dealer's attorney usually started without any background in arguing a case under the Good Faith Act. On the other hand, a manufacturer's legal staff became expert in arguing such a case as it faced a series of these suits. It could polish its basic brief in case after case and even influence the company's business practices—such as record keeping —so that it would be ready for any suit. . . . While individual dealers decide whether or not to file a complaint, the manufacturer, as any fairly wealthy defendant facing a series of related cases, could control the kinds of cases coming before the courts in which the Good Faith Act could be construed. It could defend and bring appeals in those cases where the facts are unfavorable to the dealer, and it could settle any where the facts favor the dealer. Since individual dealers were more interested in money than establishing precedents . . . the manufacturers in this way were free to control the cases the court would see.
>
> The net effect . . . was to prompt a sequence of cases favorable to the manufacturers.

14. Cf. Rosenthal's (1974a:96) observation that "a quick settlement is often in the lawyer's financial interest." On the bias against elaborate preparation of the claims of one-shot plaintiffs see Ross (1970: 82); Carlin and Howard (1965:385).

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I do not mean to suggest that the strategic configuration of the parties is the sole or even necessarily the major determinant of rule-development. The point here is merely to appreciate the superior opportunities of the organizational litigant to trigger and pursue promising cases and prevent the institution or fruition of unpromising ones. Finally, if we recall that rules do not automatically, and costlessly confer advantages on their intended beneficiaries, we come to yet another major advantage of the organizational litigant. Such a party is more likely to be able to invest the matching resources (e.g., knowledge, attentiveness, expert services, money) necessary to secure the implementation of rules favorable to it.

I have tried to state in general terms how organizations occupy a position of advantage in the configuration of contending parties. As one might expect, those who occupy this position of advantage tend to enjoy other advantages as well. Foremost among these are massive disparities in the quality and quantity of legal services utilized by individuals and by organizations.[15] Indeed, legal professionals in the United States can be roughly dichotomized into those who provide a limited range of services to individuals on an episodic basis and those who provide a wider range of services to organizations on a more continuing basis.[16] Although there are many exceptions and irregularities, there is a pattern of massive differences in education, skill and status between these groups.[17] There is also a massive difference in the range and quality of services provided. The profession is organized to provide a wide range of services to organizations and a much narrower range to individuals.

Are we to use as the standard of "quality, scope, and character" of the representation to which a poor person is entitled the services

15. Legal services are one vehicle through which differences in party capability have effect, but we cannot reduce those differences to differences in the supply of legal services. First, the capacity to use law effectively is not something supplied exclusively by professionals and entirely separable from the parties. Parties themselves can have different levels of capacity to utilize the legal services. For example, Douglas Rosenthal (1974a) found that superior results were obtained by "active" personal injury plaintiffs. A study of the California Small Claims Courts, in which lawyers were not permitted to appear, found that businesses that were frequent users "formed a class of professional plaintiffs who have significant advantages over the individual." (Moulton, 1969: 1662) Further, there seems to be comparative evidence that major distinctions in party competence can exist quite apart from disparities in legal services. The reports of Kidder (1973, 1974) and Morrison (1974) on litigation in India suggest a distinction between the "experienced" or "chronic" litigant and the naive and casual one which seems to be quite independent of the organization of legal services.
16. Auerbach (1976) depicts the extent to which the elite bar, serving the organized sector, has dominated the profession's policies about the organization and delivery of legal services.
17. On stratification in the American legal profession, see Carlin (1962, 1966); Ladinsky (1963); Lortie (1959); Auerbach (1976). But cf. Handler (1967).

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supplied to General Motors or the Tobacco Institute? That would include a wide array of counseling for prevention and planning as well as representation in a variety of legislative and administrative arenas to secure favorable rules and avoid unfavorable ones. I tend to doubt that the Legal Services Corporation will be in a position to employ such a standard. But to pose such a quixotic goal reveals more than the limitations of the Corporation. It points to the fact that parties differ in their capacity to utilize legal services. What is routine and rational for an organization is monstrous for an individual.[18]

If we take an isolated individual with his claim or grievance or ambition, it is indeed a rare instance in which the kinds of options that are routine for large organizations will be feasible and effective. In brief, these forums and the resources that one must marshal to be effective in them are just the wrong size for individuals.[19] For the most part, individuals have claims or grievances that are too small relative to the cost of remedies, or too large relative to their need to be risk aversive. The basic problem then of making individuals effective players of the law game is to find means of aggregating claims that are too small or sharing (or dispelling) risks[20] that are too large. I would like to discuss some of the ways in

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18. Cf. Cramton (1975:1342):

> If the client's interests are best served by negotiation and settlement, that course should be followed. But if litigation is necessary, it should be pursued to the hilt. An appeal from an adverse decision below should be taken when the interests of the client would be served. And participation in administrative or legislative proceedings may often be appropriate or necessary in order to advance or protect the client's interests.

19. For example, the legal aid attorney who prevailed in *William* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), reported that the case required 210 man hours of legal work. See Skilton and Helstad (1967:1480, n.38). At a modest hourly fee of $25, protection of Mrs. William's $1800 worth of purchases would have cost her $5250 in lawyers' fees alone. An even more daunting example is provided by the experience of A. Ernest Fitzgerald, the Air Force cost analyst who disclosed the multibillion dollar cost overrun in the C-5A transport. In the course of winning his six-year fight for reinstatement (with back pay) in his $31,000 per year job, he accumulated lawyers fees of more than $400,000:

> [A] small army of Government lawyers was set to work against Mr. Fitzgerald—lawyers representing the Air Force, the Department of Defense, the Justice Department, the United States Attorney's Office and the Civil Service Commission.
> These lawyers delayed hearings, refusing to turn over documents, appealed every concession made, filed motions that required scores of time-consuming proceedings taking up time—and all the while Mr. Fitzgerald's attorneys were costing him $125 an hour.
> [*N.Y. Times*, Jan. 2, 1976:8.]

It is reported (Green, 1975) that Mrs. Aristotle Onassis ran up lawyers' bills of $400,000 in successfully fending off the intrusive attentions of photographer Ron Gallella. (Upon her husband's refusal to pay, the law firm brought suit and eventually settled for $225,000.)

20. The following discussion concentrates on the aggregation of claims. Organization also permits the sharing of costs and the pooling of risks. In particular, it helps to reduce the risk of retaliatory action as is suggested by the example of labor unions.

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which claims do get made the right size and to suggest the role of legal services in such aggregation-risk sharing.

By methods of aggregation I mean ways of organizing individuals into coherent groups that have the ability to act in a coordinated fashion, look out for their long-range interests, benefit from high grade legal services, employ long-run strategies, etc. Consider some of the ways in which parties can become effective legal actors.

(1) One alternative is the membership association which acts as a bargaining agent on behalf of individuals who share a particular interest. The outstanding example is, of course, the labor union. Tenant unions are a less successful instance.

(2) The interest group-sponsor (e.g., NAACP, ACLU, environmental groups) has had a major impact and will undoubtedly continue to do so.[21] Such organizations do not routinely service individuals, nor is their deployment of legal resources accountable to the constituency on whose behalf they speak.

(3) Another interesting pattern is the assignee-manager of fragmentary rights. The outstanding example that comes to mind is performing rights associations like ASCAP. This type of organization solves a problem that is not wholly unlike the problem of vindicating many consumer and environmental rights today. That is, the holders of these rights have tiny fragments that are not worth the cost of widespread and continuous monitoring,[22] nor of enforcing remedies in complex proceedings. I submit that this kind of alternative deserves more attention. Imagine, for example, a large number of people assigning their various rights to be free of pollutioi, impure food, or whatever, to an association which would manage these rights, engage in appropriate monitoring activity, and seek damages in instances of violation. (An analogous device is

21. For a perceptive discussion of the operating style and conditions of effectiveness of this kind of organization, see Rabin (1976:209 ff.).

22. Prior to 1914, individual authors, composers and publishers realized little in the way of royalties for the public performance of their compositions. It was impossible for individuals to maintain constant surveillance throughout the forty-eight states and to collect royalties for each performance of their musical compositions. It was also difficult for them to prosecute each establishment which performed their music without the payment of royalties. The problem of collecting royalties and protecting copyrights was met by joint action of the authors, composers and publishers. Where individual action could be sporadic and ineffectual, combined resources and vigilance and concerted threats of prosecution for copyright infringement enabled the copyright owners to force the many users to pay for the public performance privilege. [Complaint in *United States* v. *ASCAP*, Civil No. 42-245 (S.D.N.Y., filed June 23, 1947), quoted in Finklestein, 1954:284.]

Cf. the bringing of a private antitrust action, seeking triple damages and injunctive relief, by a Retail Druggists Association, "a nonprofit corporation, an assignee of more than 60 commercial pharmacies." ***Abbott Laboratories*** v. ***Portland Retail Druggists Association***, **96 S. Ct. 1305 (1976).**

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the collection agency, which assembles many similar claims that can be handled in routine fashion.) One can think of a number of serious obstacles: rules against champerty, etc., possible public policy against the assignability of such claims and formidable difficulties of organization.[23] This kind of device would overcome some of the arguments raised against class actions—their cumbersomeness, the burden on the courts, and their self-appointed "misrepresentation" of affected parties.[24]

All of these means of aggregation involve the formation (or utilization) of organizations.[25] An organized group is not only better able to secure favorable rule-changes, in courts and elsewhere, but is better able to see that good rules are im-

23. The recent unsuccessful attempt to form a publicly held, for profit corporation to finance public interest litigation is instructive. Between 1971 and 1976, attempts to establish Public Equity Corporation received considerable attention in the popular and financial press. See, e.g., Brooks (1971); Mechling (1975); Metz (1974); Stabler (1974); Hougan (1975). After several years of support by foundation grants, the firm's promoters were able to overcome resistance from the American Bar Association (which was suspicious of possible maintenance, champerty, and barratry), the S.E.C. (which was concerned with its high risk stock offering), and Ralph Nader (who was for a time disturbed by Public Equity's profit-making aspects). The venture foundered in February 1976 when it failed to attract a minimum investment of $720,000. See Cunniff (1976).

24. A governmental and post-hoc variation of this notion was proposed by Rosenberg (1971:813-14) to deal with high-volume, low-value disputes. He proposes "compensation without litigation":

> For example, why not create a Department of Economic Justice to dispense quickly remedies in cash or in kind to complaining customers who have been unable to get satisfaction from the merchant or manufacturer responsible for the defective product? . . . On a pilot project basis, I propose . . . to underwrite experimentally a system of delivering justice . . . [the] main features [of which] would be simple. When the customer presents his grievance, his statement will be taken down, he will sign his name, and on the spot will be given the relief due him, up to a limit of say, 200 dollars or so, in cash or in kind.
>
> From the public viewpoint, the system could have advantages not only of economy but also of effectiveness. Through a national network of offices, the Department of Economic Justice would learn quickly if a manufacturer has been making defective television tubes or components on a grant scale; or thousands of unsafe brake linings; or too many permeable raincoats. Then it would be able to take the legal action appropriate to the situation—including wholesale (and hence, economically worthwhile) suits to recover amounts it had already paid out administratively, along with costs, interest, and other economic sanctions or cease and desist orders; or sterner sanctions if appropriate. This system would offer an efficient way of coordinating complaints and consolidating claims that have a common basis. It would also permit quality control of a more effective kind than isolated court suits do.

25. Perhaps the greatest tribute to the potency of organizations for the effective use of the legal process is to be found in Congress's prohibition of the Legal Services Corporation from spending any funds

> to organize, to assist to organize, or to encourage to organize, or to plan for the creation or formation of, or the structuring of, any organization, association, coalition, alliance, federation, confederation, or any similar entity, except for the provision of legal assistance to eligible clients. . . .[Legal Services Corp. Act, 42 U.S.C. 2296f(b)(6) (1974)]

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plemented.[26] An organization can expend resources on surveillance, monitoring, threats, or litigation where similar expenditures would be uneconomic for any individual. Such a group would enjoy the strategic advantages that we have suggested accrue to recurrent organizational litigants. In America, at least, law is a complex and expensive activity requiring employment of full-time specialists. Organizations can use the law rationally and routinely because they are the right size.[27]

Organization is not cheap: organizing those who share an interest requires an outlay of money, energy, attention, entrepreneurial skill, etc. For various reasons a class of claimants may be relatively incapable of being organized. Its size, relative to the size and distribution of potential benefits, may require disproportionately large inputs of coordination and organization.[28] Or a shared interest may be difficult to perceive. Or it may be insufficiently respectable to be publicly acknowledged (but this can change quickly, as the homosexual example suggests). Or individuals may have no permanent or predictable identification with a particular interest, but occupy various roles interchangeably (e.g., home buyer and seller, auto driver and pedestrian). Because many interests are unlikely to impel organization on their own account, the input of organization will often have to be supplied by groups that are already organized for other purposes.

There are other methods of aggregation that do not entail organization. One is the clearing-house which establishes a communication network among individuals with similar interests (lowering the cost of information and providing enhanced power to assert control through effect on reputation). A minimal but widespread instance of this is represented by the "media ombudsman"—e.g., the "Action Line" type of newspaper column.[29]

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26. See, e.g., Mayhew's discussion of the greater strategic thrust of group-sponsored complaints in the discrimination area (1968: 168-73).
27. Of course, organization, once achieved, opens up a wide range of options beyond the use of legal fora—boycotts, demonstrations, lobbying, and many other forms of concerted action.
28. Olson (1965:127) argues that capacity for coordinated action to further common interests decreases with the size of the group: "relatively small groups will frequently be able voluntarily to organize and act in support of their common interests, and some large groups normally will not be able to do so." Where smaller groups can act in their common interest, larger ones are likely to be capable of so acting only when they can obtain some coercive power over members or are supplied with some additional selective incentives to induce the contribution of the needed inputs of organizational activity. On the reliance of organizations on these selective incentives, see Salisbury (1969) and Clark and Wilson (1961). Such selective incentives may be present in the form of services provided by a group already organized for some other purpose. Thus many interests may gain the benefits of organization only to the extent that those sharing them overlap with those of a more organizable interest. (Consider, for instance, the prominence of unions as spokesmen for consumer interests.)
29. See sources in note 10 above.

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Perhaps the most widespread of all aggregation devices is governmentalization—utilizing the criminal law or the administrative process to make it the responsibility of a public officer to press claims that would be unmanageable in the hands of private grievants. This is typically a weak form of aggregation, in the American setting at least, for several reasons. First, there is so much law that officials typically have far more to do than they have resources with which to do it. So they tend to wait for complaints and to treat them as individual grievances[30]. Thus Selznick (1969: 225) observes a general "tendency to turn enforcement agencies into passive recipients of privately initiated complaints. . . . The focus is more on settling disputes than on affirmative action aimed at realizing public goals." Second, enforcers have a pronounced tendency not to employ litigation against established and respectable institutions.[31] On the basis of a comparative survey of governmental advocates, Mauro Cappelletti (1975: 881) concludes that there are "insurmountable obstacles—educational, structural and 'career' obstacles" to relying upon governmental legal officers to champion emerging collective interests effectively.

Of course, specialized professionals may themselves act as a surrogate for organization. Lawyers who specialize in the problems of unorganized claimants (e.g., personal injury lawyers, divorce lawyers) provide the advantages of experience and expertise and also enjoy economies of scale and a basis for commitment in bargaining. Such specialists are much more limited, however, in providing a substitute for the organizational claimant's capacity to structure the transaction, to play the odds, and to influence rule-development and enforcement policy. Specialization develops even more intensively among lawyers representing organizations than among those representing individuals. On the whole specialization may be thought of as accentuating the advantages of organized users of the legal process over unorganized ones (Galanter, 1974: 114-18).

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30. For example, the Fraud and Complaint Bureau described by Steele (1975), or the antidiscrimination commission described by Mayhew (1968).
31. Consider, e.g., the patterns of air pollution enforcement described by Goldstein and Ford (1971) or the Department of Justice position that the penal provisions of the Refuse Act should be brought to bear only on infrequent or accidental polluters, while chronic ones should be handled by more conciliatory and protracted administrative procedures [1(12) *Env. Rep. Cur. Dev.* at 288 (1970)]. Compare the reaction of Arizona's Attorney General to the litigation initiated by the overzealous chief of his Consumer Protection Division, who had recently started an investigation of hospital pricing policies:

> I found out much to my shock and chagrin that anybody who is anybody serves on a hospital board of directors and their reaction to our hospital inquiry was one of defense and protection. My policy concerning lawsuits . . . is that we don't sue anybody except in the kind of emergency situation that would involve [a business] leaving town or sequestering money or records.. . . I can't conceive any reason why hospitals in this state are going to make me sue them. [*N.Y. Times*, April 22, 1973:39]

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Public interest law firms, so called, can be viewed as an attempt to obtain these advantages by creating a capacity for the previously unorganized to participate in the legal process in the manner of an organization, able to pursue long-range goals[32] (Rabin, 1976; Scheingold, 1974: 194 ff.). (The economic viability of such firms remains precarious, except where they service established organizations). The class action may also be thought of as a device for securing the benefits of scale without undergoing the outlay for organizing. Clearly its scope is going to be more limited than many had hoped.[33] The costs and benefits of these devices compared to other aggregating devices remain to be measured.

We face choices between alternative paths of providing legality—simple and accessible public forums, private sector tribunals, aggressive governmental champions, available and augmented legal services, more competent and organized parties. Obviously the choice in any given case will have to depend on a detailed assessment of costs and benefits.[34] I only stress here the importance of informing ourselves about alternatives so we can make such assessments. We need to guard against automatically assuming that providing lawyers' services is the most appropriate way to solve the problem.

The discussion here has emphasized the use of law as an instrument of redistributive change. But of course such uses of law are exceptional. Most recourse to law, even by the most formidable and adroit organizational players, is aimed not at systemic change but at securing routine gains and protections in recurrent situations. And most uses of lawyers' services are in handling such routine matters. To the extent that lawyers can unequivocally help people muddle through day to day by handling such problems as preparing tax forms, handling property transactions, obtaining divorces, marshaling injury claims and staving off creditors, their services are most subject to being eliminated by simplification or replaced by subprofessionals. Paradoxically, the distinctive skills of lawyers are most needed where the benefit of using them is most problematic.

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32. The literature on public interest law is vast. For some useful introduction, see, *Yale Law Journal* (1970); Lazarus (1974); Rabin (1976). Cf. Scheingold (1974). In spite of the considerable attention paid them, the public interest bar in 1975 consisted of 500-600 lawyers—including those retained by organizations like the Legal Defense Fund of the N.A.A.C.P.—out of a total of more than four hundred thousand. A survey conducted by the Council for Public Interest Law identified 90 tax-exempt private firms and 70 fee-supported firms that spend at least 10 percent of their time on public interest work (*N.Y. Times*, Feb. 3, 1976:47). Cf. Handler (1976:99). Of course, the "public interest" format can be used to augment the representation of "haves" as well as of unorganized "have-nots." For an account of one such firm, see Weinstein (1975:39).
33. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).
34. Among the costs, of course, is dependence on lawyers. See Wexler (1970); Brill (1973); Rosenthal (1974a).

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IV. TOWARD A RESEARCH AGENDA

Let me try to suggest issues deserving of further research because of their implications for policy and their promise for the development of a systematic understanding of the legal process. I mention the last because I think this is an area in which theory can offer us some guidance—at least in overcoming the distortions imparted by the professional tendency to view the legal process through the lens of rules and the professional assumption that the way to secure their benefit is by providing a lawyer.

In doing so I shall say little about questions of measuring the effect of modifications in the organization, staffing, and financing of legal services. Obviously, these are of crucial importance, but I prefer to place my emphasis elsewhere for several reasons. First, there is no reason to suspect any lack of alertness to such issues. I believe that there is more likely to be systematic neglect of variables at the level of parties and institutions. Such neglect would in the long run curtail the value of research on legal services delivery systems, I submit, because we will not know how lawyers' services interact with other factors to produce unexpected results—or fail to produce expected ones. We will have a less adequate basis for specifying the effects of various legal services arrangements. And, most important, we will have less basis for estimating whether comparable benefits might be produced at lower cost by some means other than providing lawyers' services. Hence, I shall confine my attention to lawyers to consideration of the connection between their services and the provision of legality through improvement of other components of the legal process.

1. We might begin by asking how much we know about the distribution of problems and difficulties that people experience. In what settings and relationships do people experience injustice? In a neglected pilot study, Barton and Mendlovitz (1960) suggested that injustice was experienced mainly in large organizational settings rather than in interpersonal dealings. Clearly even a rough profile of the sources of trouble would have great implications for designing the kind of access to legality that might be useful. For example, consider the controversy over the viability of proposals for neighborhood moots or mediators (see Felstiner, 1974; Danzig and Lowy, 1975; Felstiner, 1975). A profile of troubles would also reveal something about configurations of parties to be expected and the kinds of resources that might be needed to service them.

2. How do individuals choose remedies? How do they shop among

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alternative forums and champions?[35] How are such choices affected by past relations between the parties? By expected future relations? By perceptions of the characteristics of various options: complexity, cost, privacy, foreignness, etc.? What role is played by beliefs about the propriety, efficacy, and manageability of various courses?

3. Generally, what kinds of beliefs and expectations do different sorts of people hold about law? About legal institutions? About lawyers? It would, I think, be worthwhile to pursue the work of critical synthesis begun by Sarat (1977), pulling together the scattered bits and pieces of data on public opinion about law, and to explore their implications for providing access to legality.

4. In considering alternative remedies we should not forget that one of the most frequent is simply avoidance in its various forms (Felstiner, 1974; Cf. Hirschman, 1970). What kinds of people, and in what situations, are most likely just to walk away? What gives people the capacity to do it—psychic readiness, ability to form substitute relationships at low cost, etc.? Can we resolve disputes by increasing the capacity to use unilateral avoidance and the ability to shop for substitutes? (Consider, for example, the possibilities of the transferable pension fund.)

5. We need research on party capability. Let's begin from the question of personal competence. What makes parties competent and effective at securing remedies or participation or whatever? Does it depend on personal characteristics like poise, confidence, education, information, proclivity and ability to bargain? (Cf. Rosenthal, 1974a.) How are such qualities—which are not random personal characteristics—socially distributed? How might they be supplied? Can people be taught to be competent claimants? Are the qualities associated with personal competence when no lawyer is present also conducive to the effective use of lawyers?

6. How is personal competence affected by different forms of legal services? Are the advantages of party competence amplified or diminished by the organization of lawyers on the basis of a fee for service, Judicare, staffed office, etc.? What are the effects on competence of different kinds of forums (adversarial vs. inquisitorial, reactive vs. proactive, adjudicative vs. mediative, professional vs. lay)? What are the effects on party competence of different kinds of rule systems (e.g., individuated 'fault' recovery vs. automatic 'no-fault')?

35. Suggestive leads are available in the anthropological literature, e.g., Nader and Metzger (1963); Hunt and Hunt (1968). In the American setting a pioneering study by Austin Sarat (1976) shows that choice between settlement, arbitration, and adjudication in small claims court is affected by party experience, past relations, and the expectation of future relations.

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7. More broadly, what are the effects on the attitudes and behavior of parties of variations in the gross architectural features of rules and institutions? For example:

(a) What is the effect of individuated "fault" treatment (as opposed to recovery on insurance or welfare grounds) on willingness and ability to pursue remedies? On satisfaction? On what parties seek?

(b) What is the effect on parties of having a forum which addresses the complexity and particular features of their case as opposed to one which ignores thcse features?[36]

(c) What is the effect of "legalism"—i.e., of a forum which subsumes specific cases under general rules as opposed to a process which emphasizes the peculiar features of cases?

(d) What is the effect of a process that aims at all or nothing, win/lose outcomes as opposed to one that seeks compromise?

8. What kinds of outcomes do parties seek? Vindication, justice, —or settlement, adjustment; "public" remedies or private ones? Although Americans have been characterized as "rights-minded" (Henderson, 1968; Hahm, 1969), there is reason to think that the appetite for justice and vindication in terms of authoritative norms is both limited and distributed in curious ways. Thus Mayhew (1975: 413) found that the proportion of respondents reporting serious problems who sought justice or legal vindication was tiny in all areas other than discrimination. I reproduce his table which shows dramatic discrepancies.

TABLE 1

PERCENTAGE OF SERIOUS PROBLEMS FOR WHICH RESPONDENT SOUGHT "JUSTICE" OR VINDICATION OF LEGAL RIGHTS BY PROBLEM AREA; WEIGHTED SAMPLE DETROIT SMSA, 1967

(Mayhew)

Problem Area	Number Reporting Serious Problem	Percentage Seeking Justice
Landlord-Tenant	92	0
Neighborhood	437	2
Expensive Purchases	408	4
Public Organizations	257	9
Discrimination	168	31

36. Cf. Yngvesson and Hennessey's (1975) observation on the nonsimplicity of small claims.

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In a study of consumer complaints to the consumer fraud bureau of the Illinois Attorney General's Division of Consumer Fraud and Protection, Steele (1975: 1140) found that the desire for public-oriented remedies varied directly with income level. The

TABLE 2

INCOME LEVEL AND REQUEST FOR PUBLIC-ORIENTED REMEDY (Steele)

	Complainant Income			
	$0 11,000	$12,000 13,999	$14,000 16,999	Over $17,000
Public remedy requested	4%	11%	16%	28%
No public remedy requested	96	89	84	72
	100%	100%	100%	100%
	(N=135)	(N=75)	(N=37)	(N=25)

Chi square test is significant at the .001 level.

complainants to Steele's Bureau were isolated individuals. There is some reason to think that individuals complaining in a setting of group activity will be more interested in "public-oriented" remedies than are unorganized individuals (Mayhew, 1968). And the question arises of how much such preferences are formed by the dispute processing institution itself—and by legal services?

I think this is an area of immense importance for the design of legal services delivery, for it suggests that there will be vast differences in the kind of services that will be sought by different populations in regard to different subject areas. And it suggests too that these preferences may themselves vary according to the character of the forum, the way in which the legal services are provided, and the degree to which parties are organized.

9. Further research is needed on the structural sources of advantage in the use of dispute processing machinery. One very suggestive line of recent findings (e.g. Wanner, 1974, 1975) shows that some parties use courts more than others and that they fare better.[37] Thus we find that courts are used overwhelmingly by organizations—business and governmental—to discipline and extract from individuals. Furthermore, organizations fare better in court: they win more often, win larger portions of their claims, and win more quickly than do individuals. I am overgeneralizing grossly here—there are many qualifications to be made—but the general pattern seems clear. There is reason to think that comparable patterns obtain in the use of other forums.[38] We need studies to

37. For a review of these findings, see Galanter (1975).
38. For example, efforts to secure broadened participation in the administrative process have succeeded mainly in stimulating additional action by groups that were already active. See Kloman (1975:67).

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explore the characteristics of forums which allow and promote such patterns of use and outcome. How much is it a matter of staffing, complexity, format, available legal services, etc.? The problem is to create forums that do not amplify but instead overcome the relative strategic advantage of some parties. But this has proven extremely difficult. One reason is we do not understand enough about the sources and character of the strength of some parties.

We have to isolate the nature (and composition) of the superior capability enjoyed by some parties. Is it a superior capacity to obtain, store, retrieve, and utilize information? Is it a superior ability to employ experts? To coordinate related claims? To employ strategies unavailable to other actors? To endure delays? One assumes that these will vary from one class of cases to another, for different parties and at different times.

What are the specific characteristics of the parties which give rise to these superior capabilities? Is it size? Absolute size (measured by personnel or dollars)? Size relative to the other party? Size relative to the claim at stake? Or is it the element of repetition: experience in handling claims? Experience in litigation? Litigation in this forum? Of this kind of claim in this forum? Again, one would expect variation by type of party and type of case.

10. If organization is closely associated with competence, what makes some interests capable of being organized? How can we account for the emergence of organizations seeking legal change on behalf of contract buyers (Fitzgerald, 1975), homosexuals (e.g. Tobin and Wicker, 1972), the physically handicapped (Achtenberg, 1975), adopted children,[39] and parents of adherents to distasteful sects?[40] How do dispersed holders of such shared interests manage to get organized? Is it a matter of intensity? Of preexisting communication networks? Of governmental sponsorship? What is the role of legal services in successful organization? Under what conditions do organizations benefit from the strategic advantages of the organized in using the legal process? Are some interests less capable of benefiting from the law game?

Finally, we need to know how to translate findings about organizational competence into programs for providing and upgrading the representation of underrepresented interests. We need, for example, field experiments comparing different styles of ag-

39. Cf. the campaign of two organizations, The Adoptees Liberty Movement Association and Orphan Voyage, to secure laws enabling adoptive children to find their natural parents (Dusky, 1975).

40. The *N.Y. Times* reports a meeting in Washington of "more than three hundred parents from groups throughout the country . . . in an attempt to persuade Government officials to investigate the Unification Church and other groups" (February 19, 1976:31).

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gregating claims by membership organization, assignment and joint management, interest group representation, class action, etc.

CONCLUSION

The emphasis on party capability put forward here proceeds from an antinomy that strikes me as a fundamental feature of our legal order. Presumably law is corrective and remedial in intent; it is designed to restore or promote a desired balance. But as it becomes differentiated, complex and maze-like in order to do this with increasing autonomy and precision, the law itself becomes a source of new imbalances. Some users become adept in dealing with it. Those with other advantages find ways of translating them into advantages in the legal arena. There arise new differences in access and competence. Thus law itself can amplify the imbalances that it set out to correct.

Earlier movements to redress these disparities have made only limited headway because, essentially, they took the parties as they found them. As we survey the prospects for large-scale programs of prepaid legal services, we stand at what may be a watershed for significant change—a new and exciting opportunity to help in the creation of more competent parties and thus new possibilities of making the law fulfill its promise.

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