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SOCIALIZING LAW, PRIVATIZING LAW, MONOPOLIZING LAW, ACCESSING LAW

Stephen C. Yeazell*

I. INTRODUCTION

A society based on the rule of law fails in one of its central premises if substantial parts of the population lack access to law enforcement institutions. The United States has made a series of choices in this regard, not always with a clear sense of their consequences. Often, in symposiums of this sort, the conversation about access to justice moves quickly to such matters as funding of local legal assistance programs and national funding of the Legal Services Corporation. There are people who have thought deeply about these questions, and we should listen carefully to their thoughts. This Article frames its discussion somewhat differently by sketching some of the choices we have made as a society and describing, as broadly as possible, the institutions that have arisen in response to these choices. The Article offers this description in the hope that it may help us make wise and informed choices about the specific topic of this symposium, “The Economics of Civil Justice.”

II. LOOKING BACK

The first step is to note a tension between the symposium title (“The Economics of Civil Justice”) and the subtitle (“How Do Americans Pay for Lawyers”), a tension that has arisen in the past one hundred years and most notably in the last fifty. The tension flows from a fundamental choice we have made—the choice to socialize the system of criminal law enforcement while privatizing the system of civil law enforcement. Today we take those choices to

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be so self-evident that we rarely contemplate their implications. This Article aims to spur reflection by taking us back about a hundred and fifty years, to the latter part of the nineteenth century.

A. Socializing Criminal Justice

1. Development of a Public Prosecution System

Until late into the nineteenth century, most criminal prosecutions were undertaken by private parties; the participation of state prosecutors was unusual. That circumstance was not surprising because the system, like today's civil system, depended almost entirely on individual initiative—a complainant filing and pressing a charge. Looking at these cases, we should not wrongly extrapolate from current conditions, imagining that prosecutions occurred only when the police had conducted an investigation but decided not to proffer charges. Rather, this was a world in which police forces were nascent organizations. Government paid judges and built courthouses, but left it largely to individual citizens to decide whether and how to invoke these officers of the law. The results were interesting, even startling, from the perspective of the twenty-first century. A well-documented survey of the system of litigation in nineteenth-century Philadelphia reveals its poorer citizens enthusiastically invoking the criminal process against each other, often for relatively petty offences that might not attract the resources or attention of public authorities today. The overwhelming majority of these private prosecutions did not involve


lawyers at all. Rather, they were brought before municipal courts in which both the prosecutor and the defendant represented themselves. Moreover, the system proved remarkably accessible to poor litigants:

By all accounts, the . . . system did not prevent anyone from participating in this criminal justice relationship. Grand jurors, judges, and journalists frequently commented on the ease with which the poorest of Philadelphians, and those otherwise excluded from public life, made use of this system. Journalists headed stories on criminal cases with titles like “the colored people love the law;” judges chided men for initiating prosecutions for assault and battery, calling the use of the law “the course of women and children.”

Not surprisingly, a number of these private prosecutions were based on weak grounds; indeed, one of the prime functions of nineteenth-century grand juries was to weed out weak cases. Put in terms of this symposium, the chief complaint registered by officials was that the downtrodden had too much “access” to this form of justice.

This world has vanished. First in the big cities, then in smaller towns, we invested public funds both in police and in professional public prosecutors. Today, publicly funded prosecutors enjoy a monopoly on decisions about whether, how, and whom to prosecute. One regularly reads bitter complaints from victims and their families that the prosecutor has refused to prosecute or has invoked too light a charge. We have socialized both the costs and the control of the

5. See STEINBERG, supra note 2, at 38.
6. See Steinberg, supra note 4, at 236, 240.
7. Steinberg, supra note 1, at 574.
8. See Steinberg, supra note 4, at 239; Steinberg, supra note 1, at 573.
9. An 1848 court reporter marveled at how “the miserable outcasts of society” raced to the aldermen over their petty quarrels, “each endeavoring to . . . have their opponents arrested before they were taken into custody themselves,” and in so doing “expend . . . the greatest portion of the money that falls by accident within their grasp.” Steinberg, supra note 1, at 575.
10. See, e.g., James Gill, Wreckage of Justice, TIMES-PICAYUNE, Jan. 4,
criminal process. Moreover, the best-known reforms of the twentieth century exacerbated rather than ameliorated this trend. Two great changes reshaped criminal process between 1940 and 2000. Courts imposed controls on police and prosecutorial behavior through a series of interpretations of the Fourth, Fifth, and Sixth Amendments to the Federal Constitution. We also extended the socialization of the criminal process by requiring that the state provide legal representation to indigent felony defendants. Both developments made the criminal process fairer, though critics continue, rightly, to insist that much remains to be done. Both developments also focused on the “objects” of criminal justice—the defendant—rather than on its purported beneficiaries—the victims and the general public. Combined, the two developments made bureaucrats of the operators of criminal justice. In a typical criminal trial, everyone in the courtroom is a government employee, and the question at issue is whether the defendant should also become an involuntary ward of the state. Criminal law itself threatens to become a specialized branch of administrative law. We often come close to losing sight of the goals of this social investment: protecting the public; making the conditions of life of our most vulnerable fellow citizens less violent and more predictable; and, establishing the conditions of order that made it possible for children to thrive, and for people to play a full role in civil society. For substantial portions of our population today, it is not clear that those conditions exist.

2. The Impact of the Public Prosecution System

To recount these changes is not to suggest that we should return to a world of private prosecution. A world in which public

2002, at B7 (pointing out that explanations offered by the District Attorney for their failure to prosecute did not in any way satisfy the victim’s family); Pearl Stewart, Lawsuit Filed Over Killing In Vallejo, S.F. CHRON., Oct. 13, 1989, at E23 (“[A]ttorney for [the victim’s family] said ‘There is no logical reason for their (county prosecutors’) failure to prosecute. I am mystified.”).

11. See, e.g., Benton v. Maryland, 395 U.S. 784, 794 (1969) (finding that the Fifth Amendment’s protection against double jeopardy “represents a fundamental ideal in our constitutional heritage”); Miranda v. Arizona, 384 U.S. 436, 467–79 (1966) (setting forth a series of procedural safeguards that law enforcement must follow in order to protect an individual’s Fifth Amendment privilege against self-incrimination and Sixth Amendment right to assistance of counsel).

authorities assume responsibility for criminal justice is almost certainly safer and fairer than that of the nineteenth century. But we ought to reflect on how these changes affect the broader topic of this symposium—"Access To Justice." The focus of such an inquiry comes properly to rest on society’s weakest, poorest, and least powerful. Invocation of the criminal, rather than the civil, process is attractive to this part of society for several reasons. First, the criminal process offers a more powerful sanction. If one can credibly threaten me with jail rather than a civil judgment, I may be prepared to come to terms with my accuser much more readily. This possibility is especially likely if I am poor enough that my assets offer little on which to execute a civil judgment.

There are signs that those invoking criminal law through private prosecution in the nineteenth century clearly understood this point. That understanding gave great leverage to the private parties who prosecuted. This leverage seems to have been especially important to the poor, who enthusiastically used the processes of criminal justice to bring both major crimes and smaller matters to a public forum. Because the private prosecutor (usually the victim of the crime) controlled the decision to bring and to drop charges, a settlement that satisfied the prosecutor-victim was often the outcome. Today, it is black letter law that a threat to invoke criminal prosecution if one does not make good on a civil claim is extortion. In a world of private prosecution, if the civil and the criminal charges were parallel, this proposition became a dead letter. Accordingly, many parties would have been able to use criminal prosecution as a tool for settlement, a tool whose power was blunted only by the ability of the grand jury to dismiss the most outrageous charges.

Second, private prosecution gives "access to justice" in another way. It allows people to identify and prosecute the offenses most salient to them. Those offenses will not always be the ones that society views with the greatest alarm. Today, big city police

13. See Steinberg, supra note 1, at 572–73.
14. See id. at 575.
departments and scholars of criminology debate "community policing" and the "broken window" approach to law enforcement,\textsuperscript{16} which advocates swift response to relatively minor crimes. The theory is that such action prevents minor offenses from becoming the precursor to more serious crimes.\textsuperscript{17} I do not propose to enter into those debates, except to note one change. Today, a shift of police or prosecutorial resources involves large political battles and the mobilization of consistent political pressure.\textsuperscript{18} Wealthy communities inhabited by political elites do not take kindly to having patrol cars diverted from their neighborhoods to graffiti patrols in poor sections of the city.\textsuperscript{19} In the world before the socialization of criminal justice, victims had the power to make some of these decisions. They did not need to convince a police chief or a district attorney to drop murder charges and go after unruly, drunken neighbors; they could do so themselves. Markets (if I can refer to peoples' willingness to invest their own time in prosecution as a "market"), not politics, determined where prosecutorial resources would be invested. This kind of "access to justice" has disappeared today.

Again, let me be clear about the nature of my thesis. This is not a call for a return to the nineteenth century. Publicly supported police and prosecution produce a fairer, more peaceful, and better world than that sketched above. But our collective decision to

\textsuperscript{18} \textit{Id.} (noting that while community policing enjoys widespread acceptance, some are uncertain whether it will be effective in reducing crime in Los Angeles, or how its effectiveness will be gauged).
\textsuperscript{19} Compare John Schwada, \textit{Alatorre Urges Plan to Deploy Officers}, \textit{L.A. TIMES}, Jan. 25, 1995, at B1 (reporting a demand by councilman Alatorre that the police department change the formula by which officers are assigned to patrol), \textit{and} Raymond L. Johnson, Jr. & Ramona Ripston, \textit{Police Deployment Formula Must Address Racial Imbalances}, \textit{L.A. TIMES}, Mar. 4, 1988, at B11 ("Of 18 LAPD divisions, the three with the highest percentage of available patrol time are the three with the highest percentages of white residents. In those divisions officers spend half their time watching for trouble \textit{before} it happens."), with George Gascón, Los Angeles Police Department, COMPSTAT Plus, http://www.lapdonline.org/organization/oo/compstat_plus.htm (last visited Jan. 13, 2006) (discussing the use of Comstat, a crime statistic management program, used in part to determine high crime areas and appropriate patrol personnel deployment to such areas).
socialize criminal justice has implications, and perhaps obligations. With socialization has come monopolization. A government monopoly has a moral, and probably a legal, obligation to exercise that monopoly responsibly. We may not be doing so. Poor people want more policing. Access to justice entails protection against unlawful evictions, predatory lending, and more. First, though, it entails protection against random violence and drive-by shootings. Citizens’ claims for protection from violence are particularly great when government has taken the most obvious means of self-help from them, by monopolizing the machinery of the criminal process. Those more imaginative than I can think about how one might frame such a claim and whether a political process or litigation pressure would be more effective. I only suggest that those whose concern is access to justice keep in mind this broader perspective, and that we should not confine attention to the current forms of civil justice.

B. Privatizing Civil Justice

The obligation to broaden our view becomes stronger when we understand that the civil justice system headed in a direction opposite that of the criminal justice system. Where criminal justice in the United States socialized in the twentieth century, civil justice privatized. It did so not in a great burst of purposeful activity but in a series of steps that included procedural reform, bar deregulation, and changes in financing—all of which interacted with exogenous developments in economic life.  

20. Good standard polling data on this point is elusive; most polls ask about generalized support for or dislike of police. See, e.g., CATHERINE GALLAGHER ET AL., ADMIN. OF JUSTICE PROGRAM, GEO. MASON UNIV., THE PUBLIC IMAGE OF THE POLICE, available at http://www.marcpi.jhu.edu/marcpi/Ethics/ethics_toolkit/public_image.htm. But one can find scattered and confirming data from actual voting patterns. In 1981 and 1985, when the citizens of Los Angeles faced a ballot initiative that would have raised taxes to pay for more police, the initiative was defeated, except in South Central Los Angeles, the poorest portion of the city. See Victor Merina, South-Central Tax Would Beef up Police, L.A. TIMES, Feb. 12, 1987, at Metro 1; cf. LOU CANNON, OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD 17–18 (1997) (noting the consistent support South Central voters give to ballot measures that raise taxes to pay for additional police officers or better police equipment); JAMES Q. WILSON, THINKING ABOUT CRIME 103–05 (1975) (describing how multiple surveys indicate that people want additional and better police).

21. See Stephen C. Yeazell, Getting What We Asked For, Getting What We
1. Procedural Reform

The first major step in procedural reform was the adoption of the Federal Rules of Civil Procedure in 1938. Many have written of the Rules' genesis and of the choices that were made. For present purposes the most significant aspect of the Rules is that they essentially privatized fact investigation through their creation of a discovery process. Before the Rules (and the analogous state procedures that began to adopt the "Rules" model over the next few decades), a litigant could often compel testimony or obtain a document only by filing suit, bringing the case to trial and employing a trial subpoena to get the witness or document. Under such circumstances one can say two things. First, trial served as a means of discovery, rather than the result of discovery. Today, litigants discover in order to prepare for (or avoid) trial. In the world before discovery, things stood upside down and trial was often the only means of discovery. Speaking in the first decade of the twentieth century, Moorfield Storey, a prominent Boston lawyer and early civil rights champion, estimated that less than one in three civil cases went to trial. A few decades later, on the eve of the Federal Rules' adoption, much more elaborate statistical compilation indicated that about one in five federal civil cases ended in trial. Today, the figures are fractions of those numbers, with recent estimates

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Paid For, and Not Liking What We Got: The Vanishing Civil Trial, 1 J. EMPIRICAL LEGAL STUD. 943, 954–56 (2004).


23. About thirty-five states have formally adopted the federal rules as their state procedural codes. John B. Oakley, A Fresh Look at the Federal Rules in State Courts, 3 NEV. L.J. 354, 356–58 (2003). Even those states (California, Illinois, and New York) that maintain distinct procedural systems have adopted the essential characteristics of the federal system: relaxed pleading, broad joinder, substantial pretrial discovery leading to summary judgment, and a relatively broad scope for res judicata. As a consequence, their civil justice systems display the same trends as those based on formal adoption of the federal rules.

24. Yeazell, supra note 21, at 949.

25. Id. at 951.


27. Yeazell, supra note 21, at 955.
indicating that only two percent of federal cases go to trial. One cannot attribute all this change to the institution of discovery, but discovery has to be part of the story. Discovery produces information, in light of which the parties may decide to settle. Discovery also imposes costs, which brings us squarely to the theme of privatization.

Discovery empowers litigants. In a civil law system litigants can only attempt to persuade a judge to seek information from the parties or others. American law, on the other hand, allows the litigants to demand information and testimony and backs those demands with legal sanctions. From such a comparative standpoint, the power delegated to ordinary litigants by the American discovery system is astounding. Ordinary civil litigants receive state sanction to require documents, depose witnesses under oath, and more. The penalties for noncompliance are substantial, including not only consequences to a litigant within the lawsuit, but also extending to possible imprisonment or fines of non-party witness who fail to comply. We have put in the hands of civil litigants powers that in many legal systems only state officials enjoy. To so note is not to criticize our choices; understanding these powers is important if we wish to understand access to justice.

2. Modern Discovery, Implications for Access

Because discovery is technical, studded with evidentiary and similar objections and with a fairly elaborate set of steps, litigants need lawyers to deploy the system. Moreover, discovery is no longer merely an optional matter, as one might have thought in the first few decades following the advent of the system. Hickman v. Taylor, the first U.S. Supreme Court case dealing directly with discovery, so described it using terms suggesting that it was both optional and no

29. See Yeazell, supra note 21, at 948–49.
32. See id. at 504.
more than a somewhat accelerated presentation of evidence that would in any case emerge at trial: "The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise." That description, while not false, omits two central elements, both of which bear on access to civil justice. First, precisely because the scope of discovery is broader than the scope of admissible evidence, it allows parties to cast their nets more broadly. Parties typically accept the invitation, to the point where modern discussions of discovery often center on whether it is abused. This opportunity also entails expense, as it takes longer to sift through large quantities of evidence and to conduct hours of depositions looking for the nugget of information that will be admissible evidence. Simply put, the opportunities presented by modern discovery have a dynamic of their own. That dynamic requires substantial investment of pretrial lawyer time and, quite possibly, the retention of expert witnesses, who often require fees. So, the availability of discovery creates a pressure for greater and earlier investment by the litigants.

Moreover, a second doctrinal development turned the opportunities of pretrial discovery into an obligation. In 1986, the U.S. Supreme Court said that a litigant who fails to employ discovery to build a basic case will suffer summary judgment. States have generally followed suit. The power to use discovery

33. Id. at 507.


37. See, e.g., CAL. CIV. PROC. CODE § 437c(p) (West 2005) (effective July 1, 2005) (codifying Celotex's incorporation of burden of production in summary judgment motions).
tools well before trial has become a duty. Moreover, the duty is one
that falls on the litigant rather than on the public’s shoulders. In the
world before the current discovery regime, the period before trial
required relatively little investment because there was little to invest
in. With discovery and the rise of expert witnesses, there arises far
more opportunity, and now, requirement for pretrial investment.
We have privatized the fact investigation phase of civil litigation, by
deleagating what were once judicial powers to private hands. Such
deleagation allows litigants to probe facts and uncover uncomfortable
truths that state officials might be reluctant to dirty their hands
with. In the context of U.S. civil justice, however, privatization
increased the investment required by litigants with no accompanying
subsidy.

3. A Path Not Taken

This latter point requires reiteration because it points to a path
not taken. During the New Deal, the United States saw major public
investments in a variety of social programs. These programs
included not only Social Security, the largest and most expensive
government program, but also substantial new federal regulatory
agencies such as the Securities and Exchange Commission and the
National Labor Relations Board. These investments often reflected
new substantive law, but they also represented implicit subsidies to
private civil litigation. When, for example, the SEC investigates
securities law violations, its staff does part of the spadework for
follow-on civil litigation. A similar pattern applies to criminal
antitrust prosecutions brought by the Department of Justice. Today,
if such investigations result in filed cases, they often produce follow-
on civil suits. Indeed, some have criticized the civil bar for
sometimes depending too heavily on such investigations. For our

38. See Marcus, supra note 34, at 159.
40. See generally Kuo-Chang Huang, Introducing Discovery into
Civil Law (2003) (alleging that civil law regimes typically under-investigate
claims because judges, who control the investigatory phase, lack incentives to
probe deeply).
41. See, e.g., Federated Dept Stores, Inc. v. Moitie, 452 U.S. 394, 395
(1981) (private civil suits following Justice Department antitrust filings);
Parklane Hosiery Co. v. Shore, 439 U.S. 322, 324 (1979) (private securities
suit following SEC enforcement action regarding misleading proxy statement).
42. See, e.g., Linda A. Willett, Litigation as an Alternative to Regulation:
purposes, these instances, which today represent a small fraction of
the national resources invested in fact investigation, suggest one way
civil litigation could have developed—but did not. That way might
have led to substantial public resources invested in factual
investigations, one of whose products might have been private civil
litigation. For that to have happened, the New Deal would have had
to produce a far broader footprint, that included state and local
governments, than it did even at its height.

One can see the faint shadow of such a possibility in police
reports that used to be prepared and filed after traffic accidents. A
generation ago, a significant accident on a public road generated a
visit from the police, who then prepared and filed an accident report
concerning the basic facts. Sometimes litigants introduced those
reports into evidence; other times, they provided the starting point
for the investigation that accompanied civil litigation. Thus, to some
extent, the police were subsidizing civil litigation as a byproduct of
their investigation. As an immediate focus, the police were
concerned with issuing citations for infractions of traffic laws. As a
more long-range effect, police investigations led to changes in road
design or markings (e.g., if a given location seemed to produce more
than its share of accidents). Today, anecdotal information and some
official pronouncements suggest that police in urban areas have
ceased to respond to such calls unless they involve serious injury or
death.43 Instead, the participants in the accident must file the
reports,44 which therefore lack the neutrality of an official
investigation. From the perspective of this Article, the authorities
have, to that extent, withdrawn the former subsidy. Given other
concerns, particularly those of violent crime, it is hard to criticize

Problems Created by Follow-On Lawsuits with Multiple Outcome, 18 GEO. J.
LEGAL ETHICS 1477, 1491 (2005) (raising several concerns with follow-on
lawsuits).

43. See, e.g., Los Angeles Police Dep't Traffic/Vehicle-Related Frequently
trafficrelated.htm (last visited Dec. 06, 2005), (informing a visitor that an
accident report must be filed in many circumstances with the Department of
Motor Vehicles, but it is the Police Department’s policy to take such a report
only if: someone is injured or dies; one of the drivers is under the influence of
alcohol or drugs; one of the drivers has fled the scene; or City property (traffic
signal, lamp-post, sign, etc.) is involved).

44. See CAL. VEH. CODE §§ 20004, 20008 (West 2000).
this "re-privatization" of traffic accident investigations. I offer it instead as a homely reminder of a road not taken.

Instead of socializing the costs of civil litigation, we have privatized them. Fact investigation, formal and informal discovery, and the cost of increasingly prevalent expert testimony all rest on the shoulders of civil litigants. These circumstances pose a challenge for access to civil justice. If civil litigants had to shoulder these costs, and if there were no financing mechanisms, one could reasonably say that no effective access to civil justice would exist for most of the population. In fact, the U.S. bar has responded with a combination of entrepreneurial ingenuity, very modest public subsidy, and significant deregulation. The result is a network of litigation finance possibilities that cover many—though not all—of the civil legal difficulties in which individuals find themselves.\footnote{See Yeazell, supra note 35 at 212–15.}

A brief catalog will serve as a prelude to a pair of suggestions about repairing the holes that discussions of access to justice sometimes overlook.

To set the context for this discussion, recall an elemental truth. In our legal system, judgment-proof clients—the intended beneficiaries of most discussions of access to justice—are sued in only two circumstances: (1) if, in spite of their indigence, they possess significant non-liquid assets, or (2) if a judgment is necessary to effect some other change in circumstances. These two situations describe the two most prolific areas in which civil defendants may need lawyers: unlawful detainer actions and divorce or custody determinations. In the first, the tenant/defendant possesses an illiquid asset—the property—that the landlord wants back. In the second, even if the parties agree to a divorce, they must have a judgment to that effect, and, if children are involved, a decree establishing custody.\footnote{See, e.g., CAL. FAM. CODE § 2338 (West 2005) (requiring the entry of a judgment by the court for a dissolution of marriage or legal separation); see also id. §§ 3421–3422 (establishing the court's jurisdiction over child custody proceedings).}

Such cases overwhelm legal aid organizations in the United States, to the point that many of them have resorted to "self-help" clinics in both areas,\footnote{See, e.g., IOLTA INFO. SERVS. & SONOMA COUNTY LEGAL AID, SHAC: THE FIRST SIX MONTHS (2001), http://www.calegaladvocates.org (search for "SHAC"; then follow the "HTM" hyperlink under "SHAC: The First Six Months").} reserving their
resources for the most unusual or most egregious situations, such as those involving domestic violence or particularly outrageous landlord behavior.  

I shall return to these two situations, particularly to the former, but it is important to bear firmly in mind that self-interest provides most indigent defendants with an unfortunate sort of “insurance” against civil litigation. Simply put, it is not worth suing them. That circumstance may explain the courts’ reluctance to find the civil equivalent of Gideon v. Wainwright in state or federal constitutions—that is, the right of counsel to indigent civil litigants. A court might thus understandably think, when faced with a controversial opinion that would order the reallocation of scarce public resources, that a “civil Gideon” might fall low on its list of priorities.

Having briefly and cavalierly dealt with potential parties on the right hand side of the “v” in civil litigation, I want to examine with slightly more detail the situation for potential civil plaintiffs. This group has benefited most from the ingenuity and the changes in the structure of the bar. For civil plaintiffs whose remedy involves damages, we have done the best job, not because of thoughtfully devised programs, but because self-interest has combined with deregulation. The contingent fee, a peculiarly American phenomenon, gets us part way there. By pooling the fortunes of plaintiff-clients, contingent fee lawyers aggregate their risks and justify investment of their time and various out-of-pocket


50. For a recent example, see Frase v. Barnhart, 840 A.2d 114 (Md. 2003), where the court declined, on procedural grounds, to decide whether the Maryland state constitution guaranteed appointment of counsel to parents facing loss of custody in an action brought by the state.
expenditures.\textsuperscript{51} In turn, the lawyer offers the winners a fee larger than they would have received had they not been willing to cross-subsidize the losers.\textsuperscript{52} By all accounts, the vast majority of individuals with personal injury claims are willing to make such a trade, even when explicitly offered an hourly fee basis.\textsuperscript{53}

But the contingent fee provides only part of the solution. In the high pre-trial investment climate of U.S. civil litigation, a contingent fee practitioner can muster the capital necessary to make rationally high investments in civil litigation only if one of three conditions are met. The first possibility is that the lawyer has the rare luxury of choosing from a great number of clients \textit{and} is sufficiently good at case-selection that she can have a small portfolio of nearly-certain winners. There are a few such lawyers, but they are as rare as the small investors who reliably pick the equivalent of Microsoft in the initial public offering market. Although those advocating damage caps and other changes in tort law emphasize such lawyers, their numbers are so small as to constitute statistical noise, and I shall ignore them for purposes of this discussion.

The two other groups are significant in size. One consists of the firm (usually small—perhaps two to twenty lawyers)\textsuperscript{54} that diversifies its practice. As Herbert Kritzer's recently published book on contingent fee practice illustrates, many of these practices spread risks by diversifying across lines of practice.\textsuperscript{55} In such a model, the firm takes some low-paying but reliable cases, such as workers' compensation, to assure a steady flow of income.\textsuperscript{56} It also takes some cases with higher risks but greater payouts, typified by personal injury cases. Finally, at the high-risk end of this type of

\begin{itemize}
\item \textsuperscript{51} See Yeazell, \textit{supra} note 35, at 212–15.
\item \textsuperscript{52} See \textit{id}.
\item \textsuperscript{53} For example, New Jersey requires all lawyers who might work on a contingent fee basis explicitly to offer clients the alternative of an hourly rate. N.J. R. Ct. 1:21-7(b).
\item \textsuperscript{54} Statistically speaking, the median size of the practice group for U.S. lawyers, even those practicing in large urbanized states like California, is relatively small: thirty percent work in 2–5 person firms and twenty-seven percent work in 6–20 person firms. \textsc{Richard Hertz Consulting, Final Report: California Bar Journal Survey} 6 (2001), \textit{available at} http://www.calbar.ca.gov/calbar/pdfs/cbj/2001-CBJ-Survey-Summary.pdf.
\item \textsuperscript{55} \textsc{Herbert M. Kritzer, Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States} 16 (2004).
\item \textsuperscript{56} \textit{Id.} at 15.
\end{itemize}
practice might come a product liability case. Such a case requires a very high investment in discovery and experts, but might also yield high rewards, both in fees and reputation. The second form of diversification is more akin to index fund investing. This type of lawyer specializes in, for example, personal injury litigation, but accepts a broad array of such cases, enough so that the gains will balance the losses. Both forms yield a diversified "portfolio" of cases. That diversification balances risks and rewards to enable the lawyer to make as large an investment in any individual case as is rationally justified.

For one concerned about access to justice, these changes to contingent fee practice mark an important change for the plaintiffs' bar. Forty years ago, Jerome Carlin chronicled the travails of some members of this group. It was not a happy picture. Undercapitalized, often undereducated, and frequently out-lawyered, these lawyers provided an "access to justice" that was sometimes a snare and a delusion. Their successors, by and large, are doing a much better job. In part this is because they have reorganized themselves in ways that provide much better services to their clients. As the quality of their services has increased, so have their incomes. One of Kritzer's interesting findings is that the incomes of the contingent fee bar essentially match those of the defense bar. This finding is of enormous consequence for those concerned about access to justice. It means that both sides in ordinary litigation have the resources to make economically rational investments in litigation. The defendant cannot credibly threaten to grind the plaintiff into the ground by out-spending him so long as the plaintiff's lawyer can match those expenditures up to the point where economic rationality causes them to stop of their own accord.

The response on the defense side has been predictable. Once the tactic of threatening to "spend them to death" lost its credibility, 

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57. See id. at 13–15. 
58. See id. at 11–16. 
59. JEROME E. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO (1962). 
60. Id. at 17–18. 
61. See Yeazell, supra note 21, at 956–57. 
62. See id. at 957 n.37. 
insurance carriers began to put their counsel under increasingly tight cost constraints.\textsuperscript{64} Insurers have brought some counsel in house, creating captive law firms.\textsuperscript{65} Outside counsel operate under increasingly tight letters of engagement, requiring specific authorization to engage in any steps beyond the most minimally required.\textsuperscript{66} For example, many insurance engagement letters require authorization to file a motion, take a deposition, or engage an expert—essentially anything that would run up the expenses of the suit. Plaintiffs' counsel are aware of these constraints, just as defense counsel know that their contingent fee adversaries are paying expenses out of their own pockets. Changes in the plaintiffs' bar have thus distributed resources as well as knowledge, far more evenly than in the preceding generation. No sane person would claim that the playing field is completely level, but its slope has diminished dramatically. This change creates better access to justice, not because of increased public subsidies, but because of a more efficient market in legal services.

For this system to work, however, the legal profession had to adapt in several ways. Some I have already noted: increased modal firm size and consequently better capitalization and some specialization.\textsuperscript{67} That system would still not suffice unless there was an efficient brokerage system that delivered cases to lawyers who possessed the intellectual and financial capital to maximize their potential. This is not a small problem. Clients who are generally the focus of access to justice discussions are, for the most part, quintessentially unsophisticated consumers of legal services.\textsuperscript{68} Most will have little or no experience with lawyers and will lack the means to evaluate their competency to handle specific cases. What is necessary is a market in claims that would create incentives for the

\begin{itemize}
\item \textsuperscript{64} See Yeazell, \textit{supra} note 21, at 959.
\item \textsuperscript{65} See, e.g., William T. Barker, \textit{Laying the Foundation For Staff Counsel Representation of Insureds}, 39 TORT TRIAL \& INS. PRAC. L.J. 897 (2004) (surveying law on the subject and recommending best practices to avoid unauthorized practice charges); Gary Young, \textit{Key States Scrutinize 'Captive Law Firms,'} \textit{NAT'L L.J.}, June 17, 2002, at A13 (reporting a California Court of Appeal ruling “that insurers using staff counsel are not engaged in the unauthorized practice of law”).
\item \textsuperscript{66} Yeazell, \textit{supra} note 21, at 959.
\item \textsuperscript{67} Id. at 957–58.
\item \textsuperscript{68} See Yeazell, \textit{supra} note 35, at 202.
\end{itemize}
lawyer who came into first contact with the client to get the case into the hands of another lawyer with the ability to maximize its potential. For a long time, the bar sought to forbid such a market by banning referral fees.\textsuperscript{69} Whatever the formal status of such bans, most observers today agree that attorneys widely ignore them—to the advantage of the clients. Recent studies of the functioning of such a referral market reveal an active and efficient market.\textsuperscript{70} In this market, lawyers lacking expertise or capital refer large or specialized cases up the chain to prominent plaintiffs' lawyers. The referring lawyers expect (and get) reciprocal referrals of cases requiring less specialized legal skills or smaller investments of capital.\textsuperscript{71} The incentives are those of self-interest. Parikh reports that attorneys along the chain benefit by achieving “elite” status within the legal community including maintaining a “distance from the ambulance chasing and undignified advertising of those who occupy lower positions in the subprofession’s hierarchy.”\textsuperscript{72}

While Parikh studied solely the Chicago bar, anecdotal evidence suggests that something similar, though perhaps not quite so efficient, operates in Los Angeles.\textsuperscript{73} Nationally, the American Trial Lawyers Association (ATLA), the trade group for the plaintiffs’ bar,\textsuperscript{74} publishes referral directories the size of the Manhattan telephone book and conducts national and regional seminars. These activities have as an implicit purpose the creation of a national referral network.\textsuperscript{75} There is a reason to believe that it functions relatively well for those cases in which economic incentives are in

\begin{footnotesize}
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\item CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 511 (practitioner’s ed. 1986) (“[T]he lawyer codes regulate fee splitting in ways that the practice of forwarding fees offends in spirit if not literally.”).
\item Sara Parikh & Bryant Garth, Philip Corboy and the Construction of the Plaintiffs’ Personal Injury Bar, 30 LAW & SOC. INQUIRY 269, 281 (2005) (drawing on Parikh’s longer and more detailed research for her doctoral dissertation).
\item See id. at 299.
\item Id.
\item Interview with Thomas Girardi, Girardi and Keese, in L.A., Cal. (Fall 2004).
\item See ATLA Practice Sections, Special Benefits Available Only to Section Members (sidebar), http://www.atla.org/sections (last visited Feb. 3, 2006).
\end{enumerate}
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operation, a category that excludes a number of cases, to which I
now turn.

III. WHO IS LEFT OUTSIDE THE NEW ECONOMY OF JUSTICE?

The contingent fee market only functions if there are damages
from which attorneys can collect fees. If no money changes hands,
nothing drives the market. The contingent fee market thus eliminates
cases seeking an injunction or similar order. Such cases constitute an
evergeous hole in the privatized system of access to law.

The largest group of such cases involves divorce and custody
adjudications. One cannot get a binding divorce or child custody
adjustments without a judicial decree. And, divorce is a big
business for U.S. courts. In 2001, the most recent year for which
complete statistics are available, the National Center for State Courts
reported that fourteen percent of the non-traffic filings, about 5.3
million cases, fell into their “domestic” category, which includes
divorces, property division, and child custody adjudications. This
category exhibited the largest growth in filings over the preceding
fifteen years. It expanded by seventy-nine percent between 1984 and
2000, more than twice the growth rate in general civil filings, nearly
twice the growth rate of criminal filings, and about a third more than
juvenile filings. Several circumstances give this group of cases
special claim in any discussion of access to justice. First, like
criminal law, divorce is a state monopoly. People can, without resort
to legal process, decide to live together or apart, but once married,
they cannot divorce without judicial action. Where the state creates a

76. See NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE
COURTS, 2002, at 35 (Brian J. Ostrom et al. eds., 2003), available at
Support and custody cases are the most prevalent in limited jurisdiction courts.
Id. Contingency fees are typically not available for these types of family law
matters. Findlaw.com, Hiring a Family Law Attorney: Types of Legal Fees,
http://family.findlaw.com/divorce/divorce-help/family-lawyer-fees.html (last
77. See supra text accompanying note 46.
78. NAT’L CTR. FOR STATE COURTS, supra note 76, at 10 tbl., available at
79. Id. at 35 tbl., available at http://ncsconline.org/D_Research/csp/
80. See id. at 1 app., available at http://www.ncsconline.org/D_Research/
monopoly, it has an obligation to create reasonable access to this necessary service. That is particularly so when the monopoly in question involves a basic unit of social life, the family. Moreover, in contemporary American society, divorce often exacerbates the former family unit’s economic problems, which correlate with women’s and children’s poverty.\(^8\) Divorce thus represents an often disruptive and traumatic event in the lives of persons at the edge of poverty.

Despite its prevalence and impact, divorce is an event with which the existing legal services network does not deal well. One can start with the legal aid establishment—the publicly funded offices that offer legal services to indigent clients. One can confidently predict that even if these offices dramatically expanded their services, they could serve only half of the demand because they would be conflicted out of representing fifty percent of the clients. The spouse who got to the office first would preclude that office’s representation of the other spouse.

In an imaginary universe, one could approach this problem by creating an “alternative” office, as the public criminal defense bar does to deal with conflicts,\(^8\) or by hiring retained counsel at public expense. Yet neither happens, in part, because if we are honest with ourselves, this is not an area of law that attracts much enthusiasm or interest even from those most dedicated to legal assistance. Few seeking careers in legal aid imagine themselves dealing with a steady diet of divorce cases. Legal aid offices reflect this situation. A representative Web site, that of the Legal Aid Foundation of Los Angeles (LAFLA), lists a “Family Law” section, but closer scrutiny indicates that the foundation offers assistance only for issues of “child abduction,” “child custody,” and “domestic violence.”\(^8\) For a

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divorce not involving such issues, the foundation offers only a page of general advice concerning deadlines and the unhelpful statement that a "regular dissolution is complicated and time consuming. If you cannot afford an attorney to help you, you should at least seek experienced help in filling out the necessary court papers. . . ."84

One cannot fault LAFLA and similar organizations for devoting resources to the most pressing cases. Nevertheless, their triage decisions do not address the legal problem that indigent families are most likely to confront. Nor are the increasingly important pro bono efforts by for-profit law firms likely to be helpful. As Scott Cummings has shown, private pro bono practice has both grown and stabilized, so that it is a significant part of the picture of access to civil justice in the twenty-first century.85 A symposium about access to justice will ignore such developments only at the peril of providing a radically incomplete picture of resources. Yet divorce is an area where it is unlikely that these private resources will provide any help. Cummings notes several reasons that private firm lawyers engage in pro bono practice. These motivations range from public relations and firm marketing to skills-building to expressions of charitable and ideological impulses.86 Yet few of these motives are likely to be satisfied by divorce assistance. Almost no large or mid-sized firms—those providing the bulk of pro bono efforts—have or seek to build divorce practices.87 As a consequence, divorce proceedings do not give these firms the opportunity to offer expertise or gain experience that will be useful in their private practices.88 Furthermore, the few lawyers who specialize in divorce cannot be expected to turn their careers into pro bono centers. One cannot then expect the future to differ significantly from the present.

86. Id. at 33–34.
88. See Cummings, supra note 85 (discussing the role of pro-bono coordinators in "freeing up other firm lawyers [in order to] play their own specialized roles").
More fundamentally, providing access to legal counsel will not cure the financial problems of divorce. If no one involved has stable employment, counsel will not provide it. But, there is evidence that in at least a portion of these cases, one partner, usually the male, has capacity to pay child support that is either untapped or unenforced.\textsuperscript{89} Sometimes, one of the partners has non-liquid assets in the form of future claims on pension or survivors' benefits. These claims must be identified and secured if the former spouse and children are to have protection down the road. Better representation would reduce at least some of the suffering entailed by divorce.

Divorce is one status determination that only a court can make—where the state monopoly suggests a special obligation to provide access to law. Citizenship is another. Just over one in nine residents of the United States was foreign born in 2000, a growth of more than fifty percent over the preceding decade.\textsuperscript{90} Sixty percent of this group—about nineteen millions persons—are not United States citizens.\textsuperscript{91} A considerable portion of the latter group has present or potential immigration problems. They are either here unlawfully or they entered lawfully but need to pay fairly regular attention to the documentation, appearances, and administrative process to maintain their legal status.\textsuperscript{92} Moreover, the principles governing immigration status are notoriously complex and, some would say, virtually lawless. As a consequence, no sane person who had a choice would embark on these seas without expert advice. In this area, traditional sources of legal assistance—I again use LAFLA only as an example—offer slightly more help.\textsuperscript{93} Because immigration status determinations involve hearings that provide training in basic

\textsuperscript{89} See Hanson et al., \textit{supra} note 81, at 331.
\textsuperscript{91} Id.
\textsuperscript{92} See U.S. Citizenship and Immigration Services, Guide for New Immigrants: Your Rights and Responsibilities as a Permanent Resident, \url{http://uscis.gov/graphics/citizenship/rights.htm} (last visited Feb. 27, 2006) (listing the requirements for maintaining legal resident status).
\textsuperscript{93} Unlike the divorce section of the site, LAFLA purports to offer direct representation in immigration proceedings. See Legal Aid Foundation of Los Angeles, Immigration Services, \url{http://www.lafla.org/clientservices/immigration/immserve.asp} (last visited Jan. 26, 2006).
advocacy skills, we can expect that private bar pro bono efforts will provide more help than with divorce proceedings. Demand will still vastly exceed supply. In a world of scarce legal aid resources, perhaps citizens should have first claim on those resources. I do not propose to enter into that debate. My point is more basic: if government requires resort to adjudication (or its administrative analogues) in respect to actions that determine a life-critical status (be it marital or citizenship), this monopoly power obligates the government to provide access to legal assistance for the indigent.

To take matters one step further, consider that in the United States at the start of the twenty-first century, divorces may have significant immigration consequences. For example, a non-citizen spouse may have her immigration status change as a result of a divorce. Or, a child may be threatened with deportation because a parent is divorced and subsequently loses legal immigration status. Relief may theoretically be available in these and similar situations, but only to the counseled. Of the few divorce lawyers able and willing to handle an indigent divorce, few or none will also have the expertise to handle the collateral immigration consequences. So long as our population looks as it does now, both morality and social policy suggest greater access to counsel in status determination cases.

IV. IMPLICATIONS: ANOTHER VIEW OF ACCESS TO JUSTICE

If the description above approximates reality, it suggests a framework for “access to justice” somewhat different from the typical pleas for more funding for the Legal Services Corporation. As a thought experiment, start with the idea that government should first provide an adequate supply of services in areas over which government claims a monopoly. One such area is criminal law and policing. In the United States today, most poor people live in areas with much higher rates of crime, particularly of violent crime, than those at the other end of the income spectrum. According to the U.S.

94. Id.
96. For an example of a request for more funding for the Legal Services Corporation, see Press Release, Am. Bar Ass’n, Poor’s Legal Needs Not Being Met: Increased Funding Needed for Legal Services Corporation, American Bar Association Says (Apr. 19, 1990) (on file with authors).
Department of Justice, which conducts regular household surveys of “victimization rates,” a person in a family whose household income is less that $7500 annually (far below the national definition of poverty)\(^9\) is almost three times more likely to be the victim of violent crime than a someone in a family with more than $75,000 in income.\(^9\) If one focuses on the most serious category, “completed” violent crimes, the disparity is even greater: households in the lowest fourteen percent of income are more than five times as likely to suffer as households in the highest fourteen percent.\(^9\)

If we start with the proposition that governments at all levels have asserted monopoly control over the operation of criminal justice in the last century and a half, some interesting entailments follow. For much of the twentieth century, those who sought “access to law” in connection with criminal justice focused on the plight of indigent defendants.\(^10\) Formally, that crusade ended with *Gideon v. Wainwright*,\(^10\) but many argue public defense is so poorly funded that many defendants do not receive assistance from competent counsel.\(^10\) They are right. But even with a modest historical perspective, one could argue that poor people in the United States suffer even more from lack of access to the other end of criminal justice—policing and prosecution. Monopolists, particularly government monopolists, have a moral and perhaps a legal duty to exercise their monopoly power fairly. The crime victimization statistics could cause one to question whether that power is being fairly exercised. Answers to that question would involve much closer scrutiny than I am able to deploy here.

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99. See id.
Let me instead make a not-too-bold assumption that, in many instances, government is not investing enough in policing and prosecution in the poorest areas. To rectify that situation—to grant the poor access to justice—one would have to invest more resources in criminal justice in poor neighborhoods. That investment would not be in additional criminal defense, but in additional policing and prosecution. Again, I am not arguing that we should not invest more social resources in criminal defense; we should. But additional police and prosecution have at least as strong a claim on public resources, given the now century-old decision to make the machinery of criminal prosecution a government monopoly.

An analogous argument might be made for family law. Though the often-cited fifty percent divorce rate is likely an overstatement, a substantial percentage of marriages in the United States end in divorce. The same data report that the divorce rate is diverging, with a significantly lower rate for college graduates than for those with less education—who will, of course, be far more likely to be poor. Consider the circumstances of a poor married couple who conclude that divorce is necessary. They can separate without undergoing a divorce, but neither can lawfully remarry. The state insists that such changes in status pass through its machinery of justice. Because the family unit appears to play an enormous role in the perpetuation of the species, developing the human capital of future generations, when a state asserts monopoly over the formalization of this status, it must help people who wish to alter it but lack means to do so. Where children are involved, the state’s obligation seems particularly strong. The increasing involvement of the state in the family also suggests that with monopoly control comes the monopolist’s obligation to ensure access.

A recent report suggests that even when these two monopolies flow together, the legal system fails badly. In the summer of 2005, the Attorney General of our largest state released a report that excoriated most of the major players in the legal system. The

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103. Dan Hurley, Divorce Rate: It’s Not As High As You Think, N.Y. TIMES, Apr. 19, 2005, at F7 (reporting that demographers estimate the rate to have leveled off at about 41%).
104. Id.
105. Id.
106. ATTORNEY GEN.’S TASK FORCE ON LOCAL CRIMINAL JUSTICE
topic was domestic violence and the legal system’s response to it. The basic finding was that many in the system failed to apply or enforce existing laws.107 Judges were not issuing restraining orders even when required to do so by applicable law.108 When judges did issue such orders, the authorities regularly failed to serve them on those to whom they applied.109 Those orders that were actually issued and served were frequently not enforced.110 In addition, no one bothered to track the spouses who were ordered, in connection with domestic violence, to attend programs designed to change their behavior, and, as a result, many failed to complete those programs.111 The report, ironically titled “Keeping the Promise,” was written by the persons and agencies that confessed failure.112 The chair of the task force, a city attorney, made an understated comment, “[i]t is a sobering document.”113 The report asserted that domestic violence in California sends 100,000 children to foster care each year and results in 169 murders.114 The basic recommendation of the document was refreshingly candid: “Enforce the laws that already exist.”115

For purposes of this discussion, one might rephrase that recommendation slightly: having monopolized family law and criminal justice, the state must exercise its powers in a responsible way to create avenues of access to justice for its weakest citizens.

V. CONCLUSION

If one accepts the terms of this argument, conversations about access to justice might take a shape different from those that have been dominant over the past few decades. Most commentators

107. Id. at Aiii (Letter from Casey Gwinn, Chair, Attorney Gen.’s Task Force on Criminal Justice Response to Domestic Violence, to Bill Lockyer, Attorney Gen., State of Cal.).
108. See id. at 2.
109. Id. at 3.
110. Id. at 4.
111. Id. at 5–6.
112. Id. app. at 93–101.
114. Id.
115. Id.
involved in those conversations have stressed additional funding for criminal defense rather than prosecution. They also have stressed additional funding (and fewer restrictions) for high-profile aggregated claims, such as class actions challenges to various public and private practices. Again, such a vision of access to justice has many attractions, and I do not argue against such investments. But I believe that the claims of the poorest for freedom from violence, and for control over life’s most intimate relation and society’s most basic unit of social life, ought to be strong ones, even for scarce resources. If this exploration starts, or revives, such a conversation, it will have more than fulfilled its aim.