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# FRAMING ACCESS TO JUSTICE: BEYOND PERCEIVED JUSTICE FOR INDIVIDUALS

Gary Blasi\*

*The current vision of access to justice is framed too narrowly. While our system is still far from providing a right to counsel in individual civil matters, we should aim toward a goal beyond providing counsel for individuals with already well-defined legal disputes. Access to justice has come to be framed rather narrowly as access of an individual to a lawyer, or some form of assistance purported to be at least a partial substitute, to help deal with a problem or dispute already framed in legal terms. The notion of a “civil Gideon” adopts this circumscribed perspective. But, access to justice should be framed to include exploring legal solutions where they are not immediately apparent, enabling collective and collaborative action when necessary, and attending to not only perceptions of procedural justice but also to outcomes. Two slum housing eviction cases illustrate affirmative representation and the contours of claims framing. A broader framing of access to justice may lead to greater equality, effectiveness, and efficiency.*

*The arc of history is long, but it curves towards justice.*

—Reinhold Niebuhr<sup>1</sup>

*Keep your eyes on the prize. Hold on.*

—African American Spiritual<sup>2</sup>

*Be careful if you don't know where you're going in life,  
because you might not get there.*

—Yogi Berra<sup>3</sup>

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\* Professor of Law, UCLA School of Law.

1. ANDREI CHERNY, *THE NEXT DEAL: THE FUTURE OF PUBLIC LIFE IN THE INFORMATION AGE* 208 (2001).

2. ROBERT PARRIS MOSES, *Keep Your Eyes on the Prize, on SING FOR FREEDOM: THE STORY OF THE CIVIL RIGHTS MOVEMENT THROUGH ITS SONGS* (Smithsonian Folkways Recordings 1990), available at <http://www.folkways.si.edu/trackdetail.aspx?itemid=27604>.

## I. INTRODUCTION

Experience and social science tell us that the way we frame issues largely determines how we make decisions about them. In this Article, I write about the framing of “access to justice.” The naïve layperson might think these three words convey the possibility of achieving a just result, a result achieved through a fair process, or more likely both; such an impression is not terribly far from the mark. But over the years, as people with particular perspectives and social situations have labored to define and operationalize the concept, access to justice has come to be framed rather narrowly into four components: (1) access of (2) an individual (3) to a lawyer, or some form of assistance purported to be at least a partial substitute, (4) to help deal with a problem or dispute already framed in legal terms. Certainly, the notion of a “civil *Gideon*”<sup>4</sup> (or a right to counsel in civil matters), which now animates a great deal of reform efforts, adopts this circumscribed perspective. We are so far from realizing such a vision that one hesitates to suggest, as I do here, that the current vision is too narrow. I will argue, however, that a broader vision may lead to more justice, even within the same resource constraints. This reframing of access to justice would encompass not only problems that have ripened into clear legal controversies but also those that might do so with the benefit of legal assistance. It would extend to a right to assistance in overcoming collective action problems and in asserting group claims where doing so is either necessary or efficient. Finally, it would include a right to effective assistance in which effectiveness is measured, at least in part, by the results achieved.

Given how distant we are from achieving far more limited goals, these propositions may seem naïve or of purely philosophical interest. But if we begin with the limited ambition of providing counsel (or purported alternatives) only in individual, well-defined legal disputes, then that is as far as we are likely to get for reasons perhaps best captured in the quotations with which I introduced this

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3. Yogi Berra, Live Your Life Like Every Day Is Opening Day, Address at Saint Louis University Commencement Ceremony (May 19, 2007), available at [http://www.slu.edu/pr/yogi\\_quote.wav](http://www.slu.edu/pr/yogi_quote.wav).

4. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that indigent criminal defendants have a fundamental right to counsel at trial and, in turn, providing the foundation for this term).

Article.<sup>5</sup> Perhaps more importantly for the short term, in expanding services at that level we may unintentionally reduce the overall level of access to justice. There are already powerful forces driving the provision of legal services toward isolated, individual, and limited assistance. Funders, both government and private, often insist on quantitative indications of service delivery that push service delivery models toward providing limited assistance to large numbers of people. There are powerful political and ideological forces that are extremely hostile to the provision of legal assistance that might challenge entrenched injustice on a wider scale. For example, although the political winds have shifted somewhat since the federal government barred legal services organizations from filing class actions,<sup>6</sup> lobbying,<sup>7</sup> or organizing,<sup>8</sup> such limitations remain, as do the interests that motivated them. It is likely that the resources to provide services on a larger scale will diminish, given limited resources and greater pressure to increase the delivery of individual legal services. In effect, there may be a Gresham's law<sup>9</sup> for legal services, as more extensive (and expensive) legal services lose to high-volume, limited assistance service providers in the competition for resources.<sup>10</sup> I argue in this Article that this result will impede important goals of equality, effectiveness, and efficiency.

I introduce the argument through the lens of a rather routine eviction case that had a somewhat exceptional trajectory and compare that trajectory to some alternatives.

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5. See *supra* text accompanying notes 1–3.

6. 45 C.F.R. § 1617.3 (2008).

7. *Id.* § 1612.3. Section 1612.4 prohibits grassroots lobbying.

8. *Id.* § 1612.9 forbids any recipient of federal legal services funds “to initiate the formation, or to act as an organizer, of any association, federation, labor union, coalition, network, alliance, or any similar entity.” Section 1612.7(a) prohibits legal aid lawyers from participating in conventional direct action events (“public demonstration, picketing, boycott, or strike”), except in relation to the lawyer’s own employment.

9. Gresham’s law is the principle, ascribed to Sir Thomas Gresham, founder of Britain’s Royal Exchange, that “bad money drives out good money.” 2 J. SHIELD NICHOLSON, PRINCIPLES OF POLITICAL ECONOMY 113 (1897) (emphasis omitted).

10. See, e.g., Charles B. Parselle, *State’s Pro Bono Setup Redefines “Temporary,”* L.A. DAILY J., Feb. 18, 2005 (applying Gresham’s law to pro bono mediation services).

### A. *The Tenant Mr. Quail*

Consider the circumstances of David Quail.<sup>11</sup> Mr. Quail was both extremely poor and mentally disabled, subsisting on a mental-disability pension.<sup>12</sup> When his landlord refused to repair some serious problems in his small apartment, he refused to pay the rent, which was his right under California law.<sup>13</sup> Predictably, his landlord served him with a notice and a subsequent summons and complaint for unlawful detainer.

Mr. Quail appeared at his eviction trial but was unable to present a coherent case. He pleaded with the trial judge to help him find a lawyer. The trial judge responded that he lacked the authority to do so. Mr. Quail lost at trial but managed to file a notice of appeal.<sup>14</sup> Facing eviction and possible homelessness, Mr. Quail filed a "lengthy, rambling, disjointed, confusing handwritten series of petitions" with the California Court of Appeal, complaining about procedural irregularities and asking for the help of a lawyer.<sup>15</sup> The court of appeal stayed his eviction and reviewed procedural irregularities in his case, finding that "the settlement and engrossment of the settled statement on appeal herein was not properly carried out" and "the engrossed settled statement does not contain the trial judge's certification that the statement accurately and truly reflects the oral proceedings."<sup>16</sup> The court also issued a writ giving Mr. Quail twenty days "to serve and file a condensed statement of the oral proceedings pursuant to rule 127(a) of the California Rules of Court, and . . . thereafter to proceed to settle the statement in conformity with the provisions of said rule 127."<sup>17</sup> One

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11. Quail was the petitioner in *Quail v. Municipal Court*, 217 Cal. Rptr. 361 (Ct. App. 1985). As a lawyer at the Legal Aid Foundation of Los Angeles, I helped prepare an amicus curiae brief to the California Supreme Court seeking a review of the court of appeal's decision denying Quail's petition for appointment of counsel. Statements regarding Mr. Quail's circumstances and the proceedings in the trial court, to the extent they do not appear in the opinion of the California Court of Appeal, are based on my memory of the record. Three justices of the California Supreme Court voted to grant review, one shy of the four needed. *Quail v. Mun. Court*, 171 Cal. App. 3d 572, 593 (Ct. App. 1985).

12. *Quail*, 217 Cal. Rptr. at 364 (Johnson, J., concurring and dissenting).

13. See generally *Green v. Super. Ct.*, 517 P.2d 1168 (Cal. 1974) (recognizing the common law implied warranty of habitability for residential leases in California).

14. *Quail*, 217 Cal. Rptr. at 362.

15. *Id.* at 364 (Johnson, J., concurring and dissenting).

16. *Id.* at 363 (majority opinion).

17. *Id.*

wonders what Mr. Quail might have made of this majority opinion. I will wager that none of my students and very few of my colleagues at the UCLA School of Law know what an “engrossed settled statement” is, or how to “settle a statement” under the California Rules of Court. The court of appeal’s decision must have mystified Mr. Quail even more than what had happened to him in the trial court.

The case would have gone unnoticed had the three-page decision of the court of appeal been unanimous. The majority opinion was followed, however, by a masterful twelve-page dissent by Justice Earl Johnson,<sup>18</sup> now retired but still one of the country’s leading advocates for access to counsel in civil cases.<sup>19</sup> Justice Johnson argued that Mr. Quail was entitled to appointed counsel both on account of his mental disability and as a general matter of civil justice:

It is now some seven centuries since the barons of England extracted the Magna Carta from King John, including the pledge: “To no one will we sell, to no one will we refuse or delay, right or justice.” It is nearly five centuries since King Henry VII guaranteed poor Englishmen the right to free counsel in civil cases. And it is nearly seventy years since our own California Supreme Court reminded us, “[I]mperfect as was the ancient common law system, harsh as it was in many of its methods and measures, it would strike one with surprise to be credibly informed that the common law courts . . . shut their doors upon . . . poor suitors . . . . Even greater would be the reproach to the system of jurisprudence of the state of California if it could be truly declared that in this twentieth century, . . . it had said the same thing . . . .”

It is far too late in the twentieth century, far too late in the history of our state for California courts to effectively

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18. *Id.* at 364–75 (Johnson, J., concurring and dissenting). Justice Johnson concurred as to the issuance of the peremptory writ of mandate, but he dissented as to the majority’s cursory denial of Mr. Quail’s requests for appointment of counsel. *Id.* at 364.

19. Justice Johnson’s remarkable career also included serving as the deputy director of the first federally funded legal services effort in the United States. See EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 72 (1978). His work continues in his present role as co-chair of the Right to Counsel Committee of the California Commission on Access to Justice, of which I am also a member.

“shut their doors upon . . . poor suitors” by denying them the assistance of counsel in civil litigation.<sup>20</sup>

There has been an explosive growth of chronic homelessness among people with serious mental disabilities in the quarter century since David Quail was evicted. Moreover, it is far less expensive to maintain such individuals in supportive housing than to respond to them on the streets.<sup>21</sup> Given these facts, one might think that Justice Johnson’s plea might have been heard by now, at least for people with severe mental disabilities at risk of losing, through our “justice system,” the essential means to survive. Sadly, however, even in such extreme cases, Justice Johnson’s goal is still out of reach.

On the other hand, there appears to be more support for a right to counsel in cases like Mr. Quail’s than in most others. This is partly a matter of framing. Not long ago, someone asked me what I thought would be the strongest case in which to litigate a right to counsel. I responded, “A case involving someone like David Quail.” First, Mr. Quail’s legal problem was not of his making. Until his landlord sued him, he only had a housing problem.<sup>22</sup> It was the filing and service of the unlawful detainer action that converted his housing problem into a legal problem.<sup>23</sup> Mr. Quail had no alternative but to respond. Second, Mr. Quail was indigent and unable to obtain counsel solely as a result of his poverty, which was, in turn, a result of his disability.<sup>24</sup> Third, his disability interfered with his ability to proceed pro se,<sup>25</sup> which highlights one of the deficiencies of limited and self-help approaches. Finally, the stake in Mr. Quail’s case was not some luxury or trifle, but it was an issue of whether he would have shelter and a home,<sup>26</sup> something viewed as a human necessity in every culture. Particularly in a culture in which agency is generally

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20. *Quail*, 217 Cal. Rptr. at 375 (Johnson, J., concurring and dissenting) (citation omitted).

21. Dennis P. Culhane et al., *Accountability, Cost-Effectiveness, and Program Performance: Progress Since 1998*, in NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH 12-11 to 12-14 (2007), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1021&context=dennis\\_culhane](http://works.bepress.com/cgi/viewcontent.cgi?article=1021&context=dennis_culhane).

22. *See Quail*, 217 Cal. Rptr. at 362.

23. *See id.* at 361–62.

24. *Id.* at 364 (Johnson, J., concurring and dissenting).

25. *See id.*

26. *Id.*

attributed to individuals,<sup>27</sup> Mr. Quail had a sympathetic case.<sup>28</sup> Yet, the trial court and the California Court of Appeal rejected his plea for legal assistance.<sup>29</sup> Three members of the then very liberal California Supreme Court voted to review the case, but they were one short of the necessary four votes.<sup>30</sup> The burgeoning right to counsel movement may yet lead to a reversal of this outcome, through either a court decision or legislation.<sup>31</sup>

If that should come to pass, shall we then declare victory and the arrival of true access to justice? Plainly, even a right to counsel restricted to individuals with limited capacity or cases involving critical human needs would be a major step forward. Such a system, however, would still leave the great majority of poor members of the community with a very limited version of access to justice—a version where access would be provided by overwhelmed legal services lawyers or an array of limited legal service providers, including the current system of self-help centers. I have written elsewhere that unless we care only about perceptions (some would say illusions) of access to justice, we need to attend closely to whether self-help and other next-best systems of providing legal assistance actually deliver equal legal service, as measured by what matters most to clients: the outcomes they produce.<sup>32</sup> And here, the evidence that self-help and other next-best systems actually deliver equal access to justice is not very promising.<sup>33</sup> This is not a new point and not one I want to belabor here. Rather, I want to suggest

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27. See Gary Blasi, *Advocacy and Attribution: Shaping and Responding to Perceptions of the Causes of Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 207, 212–13 (2000) (providing a brief introduction to the evidence of “attributional” beliefs about homelessness).

28. Sympathy toward people with disabilities is not necessarily accompanied by more positive attitudes. See Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 475–79 (2008) (citing studies that show implicit biases against people with disabilities).

29. *Quail*, 217 Cal. Rptr. at 363.

30. *Quail v. Mun. Court*, 171 Cal. App. 3d 572, 593 (Ct. App. 1985).

31. The Brennan Center for Justice at NYU School of Law provides the valuable service of compiling and distributing developments regarding “civil *Gideon*” around the United States and other countries. These developments are available at Brennan Center for Justice, [http://www.brennancenter.org/content/resources/elerts\\_legalservices/category/civil\\_gideon/](http://www.brennancenter.org/content/resources/elerts_legalservices/category/civil_gideon/) (last visited Apr. 9, 2009).

32. Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 870, 875–77 (2004) [hereinafter Blasi, *How Much Access?*].

33. See Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 L. & SOC’Y REV. 419, 426–29 (2001).



the value of an alternative vision—one that not only conceives of access to justice in the resolution of individual disputes already defined in legal terms, but one that also locates those disputes within a broader context and responds to them there. In other words, securing a right to counsel for individuals in circumstances like those faced by David Quail is absolutely essential, but it is not sufficient to achieve reasonable goals of equal access, effectiveness, and efficiency. To further illustrate this point, I introduce another slum housing case.

*B. Ms. Carbajal and the Main Street Tenants*

As a beginning legal services lawyer in 1978, I knew that many of my clients reported having problems of the kinds that caused David Quail to withhold his rent: lack of heat and hot water, cockroach and rat infestations, broken windows and doors, cracked walls, and peeling paint. One of those clients was Celia Carbajal, an immigrant mother and garment worker from El Salvador who lived in a sixty-unit building on Main Street, a mile south of downtown Los Angeles and only one block from my office.<sup>34</sup> In order to try to pressure the landlord, she gave the manager a list of serious problems in her apartment and in the building, along with a note that she would not pay rent until they were repaired. Shortly thereafter, she appeared on my intake day with an eviction notice. I had represented scores of tenants before, particularly in eviction cases, and I knew what to do. I had visited their homes, taken pictures, and helped them collect “Roach Motels” (many evidencing signs of “No Vacancy”) along with the proceeds of mouse and rat traps (these were useful for settlement purposes but not popular with court clerks who might be called to mark them as trial exhibits). At the time, I thought that each of my clients received excellent representation (as a matter of fact and not just ego) and real access to justice, even when we lost at trial. Although I worked with some tenant organizations, I generally framed my job as helping one family at a

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34. The building was located at 1821–1839 South Main Street in Los Angeles. Through the wonders of the “street view” feature of Google Maps, readers can see recent images of the now-renovated building (actually two contiguous buildings). Google Maps, <http://maps.google.com> (search for “1821–1839 S. Main Street, Los Angeles, CA”; then follow “Street view” hyperlink) (last visited Apr. 9, 2009).

time, the family having effectively been selected for my help by a landlord through the service of an eviction notice.

I also knew Ms. Carbajal's landlord, Dr. Milton Avol. I had represented another one of his tenants when he tried to evict her with no notice at all.<sup>35</sup> Dr. Avol was a Beverly Hills neurosurgeon with a lucrative side business as a slumlord, owning several large apartment buildings in the poorest neighborhoods of Los Angeles.<sup>36</sup> I had not visited Ms. Carbajal's building, however, until I accompanied her to see her apartment and take photographs. Perhaps partly because I knew her landlord, I grew increasingly angry with what I saw: children playing in darkened hallways (light bulbs cost money), stairwells with broken railings, inoperable fire escapes and fire hoses, heaters that had not worked in years, leaky plumbing, fresh evidence of vermin, and other violations of basic housing and health codes. And the rent for Ms. Carbajal's unit was not cheap; on a per-square-foot basis, it was more expensive than my own house.

I went back to the office determined to do more than just defend Ms. Carbajal's eviction. After meeting with the senior lawyers in the office, my colleague Barbara Blanco<sup>37</sup> and I decided we would sue Dr. Avol on behalf of all the building's tenants who would agree to representation, seeking both injunctive relief and damages under every legal theory possible.<sup>38</sup> Doing this for Ms. Carbajal alone

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35. Dr. Avol sought to evict our client Sara Arrieta based on a notice and later default judgment against her boyfriend, who had long departed before the notice was served. Under the policies of the Los Angeles County Marshal at the time, if a landlord obtained a judgment against any tenant in a unit, all tenants of the unit would be evicted. *Arrieta v. Mahon*, 644 P.2d 1249, 1250-51 (Cal. 1982). We sued the Marshal to force his office to change that policy. The trial court granted declaratory and injunctive relief to that effect, which was eventually affirmed by a unanimous California Supreme Court. *Id.* at 1250-51, 1257.

36. One of Dr. Avol's other claims to fame was his status as the first slumlord sentenced to spend time either in jail or in one of his own buildings. *People v. Avol*, 238 Cal. Rptr. 45, 49 (App. Dep't Super. Ct. 1987) (affirming the sentence); see also *House Arrest for a Slumlord*, TIME, July 1, 1985, at 29; Robert Schwartz, *Make Way for Landlord; For Tenants, It's Not a Sentence, It's Home*, L.A. TIMES, June 19, 1985, at 1. The episode later found its way, as all good stories in Los Angeles do, onto television in an episode of the drama *L.A. Law*. RANDALL BARTLETT, *THE CRISIS OF AMERICA'S CITIES* 130-31 (1998).

37. Barbara Blanco is currently a Clinical Professor of Law and Faculty Clinical Director at Loyola Law School Los Angeles.

38. Complaint for Injunctive Relief, Restitution, and Damages, *Carbajal v. Avol*, No. C288362 (L.A. Super. Ct. June 18, 1979). Fortunately for us, a group of students at U.C. Berkeley School of Law (Boalt Hall) developed a model complaint, based on both common law and statutory theories, which had never been tried in court as far as we knew. The model complaint was developed for a handbook on housing law prepared by the National Housing Law Project, and it was incorporated as an appendix to MYRON MOSKOVITZ ET AL., CALIFORNIA

would not have made sense because of our limited resources and because the other tenants in the building shared virtually all of Ms. Carbajal's problems. The common areas were obviously, well, common. The lack of heat resulted from a single decrepit furnace boiler in the basement. The cockroaches lived in every interstice of the building; cleared from one room, they would quickly return. Ms. Carbajal's problem required a collective solution, so we enlisted the help of a tenant organization, Inquilinos Unidos, to help us work with the tenants.

At the hearing on the preliminary injunction, Dr. Avol's lawyer offered to settle the case. Under the terms of the stipulated judgment, an injunction would issue requiring Dr. Avol to fix a detailed list of problems that we would specify, and Dr. Avol would pay our clients a few thousand dollars in general damages. The repairs were made, and heaters were installed. A stipulated judgment for a few thousand dollars in damages was entered. Although we had to have the sheriff threaten to tow away the Oldsmobile belonging to Dr. Avol's wife in order to collect the money judgment, Dr. Avol began to make repairs.<sup>39</sup> Our clients were satisfied, as were we, that some justice had been done.

Unfortunately, the story of the Main Street building does not end there. Although repairs were made as the result of our settlement, Dr. Avol maintained the same business model of "milking"<sup>40</sup> the building, and the slum conditions returned within a few years. Once again, legal services lawyers (joined this time by a private litigation firm) sued Dr. Avol on behalf of the tenants, almost all of whom were new since the first case. And once again, the tenants secured an injunction requiring repairs. This time, however, they collected much more money in damages from Dr. Avol (or rather his insurers), and the plaintiffs' lawyers got more than one million dollars in

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EVICTED DEFENSE MANUAL (1971). Interview with Myron Moskowitz, Professor of Law, Golden Gate University School of Law, San Francisco, Cal. (May 26, 1995) (on file with author).

39. Having met Dr. and Mrs. Avol at a deposition, we surmised that the prospect of having a sheriff tow away Mrs. Avol's Oldsmobile, in full view of her Beverly Hills neighbors, would get her attention and, consequently, Dr. Avol's attention.

40. For an explanation of the term and process, see Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485, 486-90 (1987).

attorneys' fees.<sup>41</sup> The story after that gets more complicated, but in essence, the same building was the subject of yet another round of complicated litigation, resulting in the appointment of a receiver and the eventual removal of Dr. Avol as the owner. About twenty years elapsed between the first case and the last.

Now the building, which lies on the border of a gentrifying downtown Los Angeles, has been rehabilitated once again by another owner, and the units are being marketed as "affordable luxury in the heart of downtown Los Angeles."<sup>42</sup> Rents have risen beyond the reach of garment workers like Ms. Carbajal.<sup>43</sup> Ms. Carbajal and her neighbors, both in the building and in the neighborhood, might have benefited from organizing and legal assistance well beyond what they received. For example, the use of government funds that are ostensibly intended to benefit low-income people has enabled much of the gentrification of the area.<sup>44</sup> Litigation, organizing, and other modes of advocacy might have reduced or ameliorated the gentrification pressure that led to their eventual displacement from the neighborhood. Advocacy also might have focused on pressuring the responsible government agencies to take a more active and effective role. Put another way, although expanding the framing of Ms. Carbajal's problem as one that she shared with the other tenants was a positive step, the framing never really went beyond the actual building in which she lived. Doing so, however, might have ultimately been more effective, a more efficient use of resources, and a greater contribution to equality of access to adjudicative systems.

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41. Complaint for Damages and Injunctive Relief, *Castaneda v. Avol*, No. C561663 (L.A. Super. Ct. Aug. 19, 1985). The private firms of Litt & Stormer and Margolis, McTernan, Scope & Epstein represented the tenants on their damages case, and the Legal Aid Foundation of Los Angeles represented them for injunctive relief. *Id.* at 1, 155; see also Gina Lobaco, *Tenants Take the Offensive: Lawyers Sue Landlords on Contingency-Fee Basis in California*, A.B.A. J., Nov. 1991, at 40, 40–41.

42. Classifieds, DAILY TROJAN, June 8, 2005, at 8, available at <http://media.collegepublisher.com/media/paper679/documents/uvtj1954.pdf>.

43. According to the Downtown Center Business Improvement District ("DCBID"), the rental prices for the units at 1821–1839 S. Main Street range from \$700 to \$1,200. DOWNTOWN CENTER LOS ANGELES BUSINESS IMPROVEMENT DISTRICT, DOWNTOWN LOS ANGELES EXISTING HOUSING DEVELOPMENTS (2008), available at [http://downtownla.com/frame.asp?mainPage=pdfs/econ\\_residential/ExistingHousingDevelopmentsQ408.pdf](http://downtownla.com/frame.asp?mainPage=pdfs/econ_residential/ExistingHousingDevelopmentsQ408.pdf).

44. See, e.g., *Unlawfully Displaced Alexandria Residents Relocated*, LEGAL AID FOUNDATION OF LOS ANGELES, May 27, 2008, <http://www.lafla.org/news/viewNews.asp?id=364> (describing how developers displaced low-income tenants from the Alexandria Hotel in downtown Los Angeles even though the developers received public funds intended to benefit the low-income tenants).

This leads us to the questions at hand. First, under a definition of “access to justice” to which we should reasonably aspire, would Ms. Carbajal and her neighbors be *entitled* to the kind of collective, affirmative representation that we—legal aid lawyers and tenant organizers—provided? Under most current conceptions, the answer is no. To begin with, the tenants did not have a *legal* problem that might be addressed by litigation until lawyers combined their circumstances with untested legal theories and produced a complaint. As I explain in the next section, even the most forward-leaning current discourse regarding a right to counsel in civil matters frames the issue in terms of individuals or families rather than buildings, neighborhoods, or classes of similarly situated people. And, of course, when Ms. Carbajal came to our office, she had the same framing: she had a legal notice and, therefore, a legal problem, but it was relevant only to her and her family. It was only through discussion, meetings, organizing, and considerable effort by our office and our organizer partners that the tenants and lawyers came to frame Ms. Carbajal’s problem as a common or group legal problem that was capable of an affirmative, collaborative, and collective solution.

Furthermore, under a reasonable construction of access to justice, would Ms. Carbajal and other poor tenants in her neighborhood have access to assistance in responding to the failures of the housing code enforcement system or the misuse of redevelopment funds? As I note below, one will find few arguments to that effect in the current discourse about access to justice. I will argue for such access, however, at least as a matter of first principles. In a world of finite resources, there will always be tradeoffs between the time spent assisting individuals like Mr. Quail or Ms. Carbajal with their individually framed problems and time spent dealing with problems common to the tenants in a building or the residents in a neighborhood. Those tradeoffs deserve careful considerations that do not prejudice an outcome. But, by framing access to justice in individual terms and with regard to problems already defined as “legal,” we do not merely prejudice the outcome; we preempt the discussion.

Here, I argue that we should *begin* with a wider framing of access to justice—for at least some populations and some kinds of problems—that would encompass a right to assistance to (1) claims

making, which would include assistance not only with problems that have ripened into clear legal controversies but also with those that might do so with the benefit of legal assistance; (2) organizing and coordination, which would include legal or organizing assistance to overcome collective action problems and to assert group claims, where doing so is either necessary or demonstrably more efficient or effective; and (3) monitoring and enforcement, which would include legal and investigative assistance to monitor and enforce compliance with equitable relief obtained through litigation or organizational or institutional change obtained by other means.

I examine several arguments for such a framing, even as advocates seek less ambitious reform. Chief among these is an argument for *equality*, given that these forms of legally assisted problem solving are routinely available to more socially advantaged groups. I also argue that the more comprehensive framing can also result in greater *effectiveness*, improved resource *efficiency*, and improved compliance with the law and a respect for legal norms. These arguments are predicated on the following assumptions: access to justice must mean more than individualized access to perceived or procedural justice, and it should be measured by outcomes as well as by processes and appearances.

## II. THE “CIVIL *GIDEON*” MOVEMENT AND THE INDIVIDUALIZED, LEGALIZED FRAMING OF ACCESS TO JUSTICE

Some may argue that I am wrestling with a straw opponent. Certainly, there is nothing new in the idea that legal services for the poor should at least go beyond a narrow focus on individualized representation with regard to clear legal claims.<sup>45</sup> The never-ending debate about the relative merits of providing assistance in “service” versus “impact” cases in legal aid circles is, well, never ending. But these issues—and the important considerations of the tradeoffs they

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45. The founders of the modern version of legal services saw the effort as one of social change, not merely access to dispute resolution. See Edward V. Sparer, *The New Legal Aid as an Instrument of Social Change*, 1965 U. ILL. L. F. 57, 60 (1965); see also MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960–1973*, at 22–39 (1993) (discussing Sparer’s role in the welfare rights movement). Stephen Wexler argued that organizing was essential to effective poverty law practice. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970). Gary Bellow advocated using individual representation strategically through a “focused case” approach. Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, NLADA BRIEFCASE, Aug. 1977, at 106, 121–22, available at <http://www.garybellow.org/garywords/solutions.html>.

invoke—seem strangely absent from current mainstream discussions about increasing access to justice. The most notable description of that goal is found in the resolution unanimously adopted by the ABA House of Delegates in August 2006:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody as determined by each jurisdiction.<sup>46</sup>

The report accompanying the recommended resolution, which was supported by a wide swath of the organized bar, noted that the resolution was consistent with fundamental principles of equal access long supported by the ABA, early English common law, many state constitutions, and practices in European jurisdictions.<sup>47</sup> The report also argued that there were sound policy reasons to afford counsel to litigants now compelled to proceed pro se.<sup>48</sup> All of the examples provided involved individuals.<sup>49</sup> The right to counsel advocated was also limited to litigative contexts, in either judicial or quasi-judicial forums: “The right defined in this resolution focuses on representation in adversarial proceedings; it does not propose a generalized right to legal advice or to legal assistance unrelated to litigation in such forums.”<sup>50</sup>

Moreover, in expanding on the meaning of “basic human needs,” the individual framing is made explicit, as exemplified by the definitions of “shelter” and “sustenance”:

- “Shelter” includes a person or family’s *access to or ability to remain in an apartment or house*, and the habitability of that shelter.

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46. American Bar Association, House of Delegates Resolution 112A (Aug. 7, 2006), <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

47. HOWARD H. DANA, JR., TASK FORCE ON ACCESS TO CIVIL JUSTICE, RESOLUTION ON CIVIL RIGHT TO COUNSEL 2, 6–7 (2006), *available at* <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

48. *Id.* at 9–10.

49. *Id.* at 9–12.

50. *Id.* at 12.

- “Sustenance” includes a person or family’s *sources of income* whether derived from employment, government monetary payments or “in kind” benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers’ wage or employment disputes where counsel is not realistically available through market forces.<sup>51</sup>

The resolution approved by the ABA House of Delegates was, of course, the product of an enormous amount of work by talented and principled people. The limited framing of access to justice for individuals—and families where the situation requires—in the context of adversarial proceedings, regarding matters already framed in legal terms, certainly represents the considered judgments of hundreds of honorable people. This same framing dominates the discussion of the issue beyond the ABA. For example, the Brennan Center for Justice at New York University School of Law<sup>52</sup> has played an important facilitative role in those discussions. The opening words of a Brennan Center white paper—a brief but thorough review of the topic—illustrate this individualized framing: “Our nation’s promise of ‘equal justice for all’ is among its proudest traditions. American courts promise a forum for individuals to settle disputes in a civil manner, under the rule of law.”<sup>53</sup>

Similarly, a recent summary and survey article on the topic in *Clearinghouse Review* (the long-time journal of record for poverty lawyers) touches on access to justice efforts around the country, citing not only national efforts but also initiatives in eleven states.<sup>54</sup> In every example, the effort is framed in terms of providing representation or other forms of assistance to individuals in well-formed legal controversies.<sup>55</sup>

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51. *Id.* at 13 (emphasis added).

52. Brennan Center for Justice, <http://www.brennancenter.org> (last visited Apr. 9, 2009).

53. *Id.* at 1.

54. Paul Marvy, *Advocacy for a Civil Right to Counsel: An Update*, 41 CLEARINGHOUSE REV. 644 (2008), available at <http://www.povertylaw.org/clearinghouse-review/issues/2008/march-april-2008-clearinghouse-review/marvy>. The examples were from Alaska, California, Maine, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Pennsylvania, Washington, and Wisconsin. *Id.* at 644–48.

55. *See id.*



One of those efforts is one in which I have been personally involved, as a member of a task force established by the California Commission on Access to Justice to draft a generic state statute that might serve as a template for state legislation.<sup>56</sup> We prepared both a State Basic Access Act<sup>57</sup> and a more comprehensive State Equal Justice Act.<sup>58</sup> The framing of the proposed guarantee is similar in both model statutes. “Full legal representation” is defined at section 202 of the more comprehensive act as

the performance by a licensed legal professional of all activities (such as investigation of facts, research of law, preparation of pleadings, negotiations, appearance at pre-trial, trial, and post-trial proceedings, preparation of appellate briefs and appearance at appellate oral arguments) that may be involved in representing a party in a court or other tribunal in which by law or uniform practice parties may not be represented by anyone other than licensed members of the legal profession.<sup>59</sup>

That level of representation (as opposed to assistance from nonlawyers or self-help assistance) would be guaranteed by the terms of the State Equal Justice Act under the following circumstances:

Full public legal representation services shall be available to *a plaintiff* only if a reasonable person in the plaintiff's position, with the financial means to employ counsel, would be likely to pursue the matter in light of the costs and potential benefits. In making that determination it shall be presumed that a reasonable person would be likely to pursue matters involving any of the following: the sole housing for *the plaintiff or plaintiff's family*; the maintenance of plaintiff's present employment or occupation; the plaintiff's current right or future right to income maintenance, health benefits and other substantial benefits from the federal, state, or local government;

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56. See Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REV. 176 (2006) (describing the background of the effort), available at <http://www.povertylaw.org/clearinghouse-review/issues/2006/2006-july-aug/pastore>.

57. STATE BASIC ACCESS ACT (Tentative Draft 2008), available at [http://brennan.3cdn.net/c8d7c0be3acc133d7a\\_s8m6ii3y0.pdf](http://brennan.3cdn.net/c8d7c0be3acc133d7a_s8m6ii3y0.pdf).

58. STATE EQUAL JUSTICE ACT (Tentative Draft 2006), available at [http://www.brennan.center.org/page/-/d/download\\_file\\_38656.pdf](http://www.brennan.center.org/page/-/d/download_file_38656.pdf).

59. *Id.* § 202.

custody and/or parental rights to children; and protection from domestic violence.<sup>60</sup>

The scenarios giving rise to a right to counsel are thus framed entirely in terms of individuals or individual families, and with reference to problems clearly defined as requiring the assistance of lawyers.<sup>61</sup> As a member of the task force that drafted these model statutes, I can say that we did not really question the implicit boundaries set by the framing we adopted at the outset, which we inherited from the California Commission on Access to Justice.<sup>62</sup> Nor do I believe that, as a matter of tactics or strategy, we erred in not doing so. I use the example here only as further evidence of the narrow framing that we (and I) have sometimes imposed on the lofty phrase “equal access to justice.”

### III. FRAMING A RIGHT TO AFFIRMATIVE AND COLLECTIVE REPRESENTATION

Certainly, there are prudential reasons for advocates of a right to counsel in civil matters to adopt the stance of the resolution unanimously approved by the ABA House of Delegates in August 2006. Even the report accompanying the resolution characterizes those reasons as a “careful, incremental approach to making effective access to justice a matter of right, starting with representation by counsel in those categories of matters in which basic human needs are at stake.”<sup>63</sup> However, primarily for the reasons embodied in Yogi Berra’s observation quoted in the beginning of this Article, we should maintain a goal of providing the kind of representation we were able to offer Ms. Carbajal and her neighbors thirty years ago,

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60. *Id.* § 301.1 (emphasis added).

61. Lesser forms of assistance—“limited legal representation,” “legal advice,” “legal assistance,” and “non-lawyer representation”—are framed in similar terms, with the difference being dictated by the rules of the forum or the criticality of the interest at issue. *See id.* §§ 302–05.

62. *See generally* STATE BAR OF CALIFORNIA, AND JUSTICE FOR ALL: FULFILLING THE PROMISE OF ACCESS TO CIVIL JUSTICE IN CALIFORNIA (1996), [http://calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10176&id=1375](http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10176&id=1375) (setting forth the findings and recommendations that spurred the establishment of the California Commission on Access to Justice).

63. DANA, *supra* note 47, at 12. For an example of how this approach might proceed, see Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 717 (2006) (assessing the efforts to obtain a right to counsel as requiring a broader social change strategy, but concluding that for strategic reasons the place to begin is with individual representation in custody cases).

which I will characterize here as “affirmative representation.” A right to affirmative representation should include a presumptive right to assistance, by a lawyer or other competent person, in (1) claims framing, that is, framing a problem affecting critical human needs in terms cognizable by law; (2) legal representation—on both an individual and a group basis—through all procedural means provided by law, that incorporates group representation where it is either required for effective relief or demonstrably superior to individualized action, including assistance in overcoming collective action problems where necessary; and (3) monitoring and enforcing compliance when the legal representation results in injunctive or other equitable relief operating *in futuro*.

By including the modifier “presumptive,” I mean to suggest that under any set of reasonable assumptions about resources, there will be more need than can be met.<sup>64</sup> How to allocate resources—who should allocate them and what principles should apply—will always be with us whether we frame access to justice in narrow or broad terms. There are at least three reasons for not privileging individual-level representation a priori, including the facts that (1) affirmative representation is essential to address both actual and perceived *equality* of access concerns; (2) affirmative representation and group representation *may*, under many common circumstances, be more *effective* than individualized, legalistic representation, or a necessary complement to such representation; and (3) affirmative representation *may* be more *efficient* than alternatives.

At the same time, there may be sound arguments, both practical and principled, to limit affirmative representation to matters implicating basic human needs, defined by the ABA resolution to include “shelter, sustenance, safety, health and child custody.”<sup>65</sup> After all, there are limits to what we should expect of law, to the extent that we regard law as distinct from politics. The equal application of our laws, particularly for the benefit of the poor and powerless, and in relation to their fundamental human needs, should

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64. DANA, *supra* note 47, at 4–5 (discussing the “persistent shortage of legal aid resources” and the “vast and continuing unmet need for the services of lawyers among those unable to afford counsel”); see also STATE BAR OF CALIFORNIA, *supra* note 62 (follow “Executive Summary” hyperlink) (“The need for civil legal assistance among low-income Californians far exceeds the current level of resources provided through government and private charity. Today, the legal needs of approximately three-quarters of all poor people are not being met at all.”).

65. DANA, *supra* note 47, at 12.

not be left to politics alone—at least not if we expect to remain a nation of laws predicated on more than mere power.

#### IV. PROBLEM-SOLVING ASSISTANCE IN NAMING, BLAMING, CLAIMING . . . AND FRAMING

At most times, ordinary people do not understand their situations in legal terms. Rather, people have problems and engage in a wide range of problem-solving activity entirely without lawyers.<sup>66</sup> Along with a number of others, I find it useful to think of what lawyers do as problem solving.<sup>67</sup> Invariably, there are potential solutions to problems that do not rely upon legal institutions; indeed, some of them require circumventing those institutions. For example, the tenants in the Main Street building might have picketed Dr. Avol's house in Beverly Hills, drawing the attention of his wealthy neighbors to the means by which Dr. Avol maintained his mansion. Lawyers would have been useful but not necessary to such an effort. One can imagine, and in moments of intense frustration I have imagined, remedies that would be plainly illegal, beyond the pale for any lawyer.<sup>68</sup> One social function of law, of course, is to provide alternative, nonviolent means to solve problems.<sup>69</sup>

Solving problems is a core function of lawyers. Legal problem solving requires framing problems in legal terms. As Felstiner, Abel, and Sarat point out: "Trouble, problems, personal and social dislocation are everyday occurrences."<sup>70</sup> By contrast, legal disputes are socially constructed through the process by which these troubles come to be perceived as grievances, followed by claims with a

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66. This point is best made in Gerald P. López's article *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (examining how human beings help each other solve problems in everyday life and how this "lay lawyering" can help us to better understand lawyering).

67. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 323–30 (1995); e.g., Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811 (1999).

68. A union organizer once explained his view of lawyers to students in one of my classes in words to this effect: "I don't want lawyers to tell me what I can't do; I want them to get me out of trouble after I do it."

69. See, e.g., SUSAN STEWART, *CONFLICT RESOLUTION: A FOUNDATION GUIDE* 14–16 (1998) ("[H]istorically the law developed as the first alternative to violent resolution of disputes.").

70. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 633 (1980–81).

potential remedy.<sup>71</sup> Certainly, the tenants of the Main Street building understood that Dr. Avol and his minion (there was only one) were not providing heat in winter or responding to widespread infestations of cockroaches and rats. But, there was no reason to expect those tenants to know that those troubles might give rise to legal claims. Indeed, such claims had existed only since 1974, when the California Supreme Court found that every residential rental agreement contains an implied warranty of habitability.<sup>72</sup>

Lawyers do more, however, than just recognize that problems may be conceived in legal terms. Lawyers also actively engage in problem solving more broadly. Although Felstiner et al. offered a brilliant exposition of the sequence of “naming, blaming, [and] claiming,”<sup>73</sup> their account did not reach the questions of *which* possible claims might result from the process and with what consequences. To address that question would have required a fourth (but still rhyming) concept: *framing*. Within legal scholarship, the best known example is the “framing effect” first identified by Tversky and Kahneman—that is, the tendency of people to prefer or to be persuaded by one interpretation of an outcome over another that is logically equivalent.<sup>74</sup> Although not as frequently addressed in legal scholarship, framing is a process and phenomenon that has attracted a great deal of research and theorizing in sociology and psychology, much of which traces the terminology, if not the actual ideas, to Erving Goffman.<sup>75</sup> Goffman defined *frames* as “schemata of interpretation” that enable individuals “to locate, perceive, identify, and label” aspects of the social world.<sup>76</sup> Sociologists explain that “frames help to render events or occurrences meaningful and thereby function to organize experience

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71. *Id.* at 634–36.

72. *Green v. Super. Ct.*, 517 P.2d 1168, 1176 (Cal. 1974).

73. Felstiner et al., *supra* note 70, at 631, 634–36.

74. See generally Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981).

75. See, e.g., Cheryl I. Harris, Review Essay, *Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907, 932–34 (2006) (using Goffman’s concept of frameworks to discuss race and racial stereotypes); David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464 (1986) (discussing adherent and constituent mobilization by using Goffman’s frame-analytic perspective to link social psychological and resource mobilization views on movement participation).

76. ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 21 (1974).

and guide action.”<sup>77</sup> Political psychologists and scholars of public communication use the term in slightly different ways, but they “agree that frames *give meaning to key features of some topic or problem.*”<sup>78</sup> Most socially relevant frames also include indicia of causation and responsibility.<sup>79</sup> The idea that the construction of meaning is an active process is central to the concept of framing.<sup>80</sup> The same information can be presented and understood in quite different ways, often with dramatically different results.<sup>81</sup> An important lawyering capacity—one I emphasize in my own clinical lawyering courses—is understanding the processes of framing and the likely consequences of various frames.

Lawyers most often work with frames that are already extant in the culture. In the case of Dr. Avol, we benefitted from the *slumlord* frame that had come to exist in American culture since at least the Progressive Era.<sup>82</sup> The slumlord stereotype carries with it notions of exploitation and reckless indifference to the plight of tenants and their children.<sup>83</sup> There is nothing intrinsic to the situation, however, that compels this result. An alternative framing would portray Dr. Avol as just another provider of cheap housing to people who can afford nothing better as a result of poor wages in the garment industry. Certainly, there is no equally negative frame or term attached to those who sell inadequate food or low-quality clothing to extremely poor people. Although it was relatively easy to cast Dr. Avol as a slumlord (and tortfeasor), there were certainly other

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77. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 614 (2000). Sociologists of social movements describe “framing” as the active process through which movement proponents are “actively engaged in the production and maintenance of meaning for constituents, antagonists, and bystanders or observers.” *Id.* at 613 (citation omitted).

78. Richard R. Lau & Mark Schlesinger, *Policy Frames, Metaphorical Reasoning, and Support for Public Policies*, 26 POL. PSYCHOL. 77, 77–80 (2005).

79. See generally Shanto Iyengar, *How Citizens Think About National Issues: A Matter of Responsibility*, 33 AM. J. POL. SCI. 878 (1989) (discussing how attributions of the causation of social problems significantly affect attitudes toward those problems, even controlling for partisanship, political leanings, and socioeconomic status).

80. Benford & Snow, *supra* note 77, at 614.

81. See Iyengar, *supra* note 79, at 897.

82. See LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* 38–39, 42 (1978). A national housing-reform movement began in the early twentieth century during the Progressive Era. Friedman writes, “It was convenient . . . to assume that landlords were a class of evil men, overcharging ignorant tenants and callous to the point of criminality.” *Id.* at 40.

83. See *id.* at 40, 42.

choices for the role of villain, most of them unexplored at the time. The point here is that exploring how best to frame problems and attribute blame is something lawyers are trained to do.

### A. Equality

The *equality* argument for including claims-framing assistance within the rubric of guaranteeing access to justice is predicated on the fact that businesses and upper-class people take the exploration of alternatives as a given component of the services they expect from lawyers.<sup>84</sup> Indeed, the upper classes are equipped with education and the social position to do a good deal of framing and claims making themselves, whether of individual or collective claims.<sup>85</sup>

In terms of individual claims, studies of claiming rates—the rates at which people frame their problems in legal terms and then make claims through the legal system—vary according to many different factors, of which social class is but one.<sup>86</sup> However, higher social class is generally associated with higher rates of claims making.<sup>87</sup> It is reasonable to expect that class differences in claims making may be small with regard to the most common claims where cultural knowledge of their availability is ubiquitous (e.g., automobile accidents) but also larger with less common claims (e.g., medical malpractice or discrimination).<sup>88</sup> One reason to expect class differences in framing and making claims is the high correlation between social class and education, including education about the process of claims making and, at least in some cases, about the process of framing itself.<sup>89</sup> If we intend the law to apply equally to

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84. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525, 551–52 (1981) (explaining that education and income affect a person's ability or likelihood to bring a claim).

85. *See id.*

86. *See, e.g., id.*; *see also* Gary Blasi & John Jost, *System Justification Theory: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1156–57 (2006).

87. Kevin D. Hart & Philip G. Peters, *Cultures of Claiming: Local Variation in Malpractice Claim Frequency*, 5 J. EMPIRICAL LEGAL STUD. 77, 91 (2008) (noting that median family income is one of the strongest factors positively associated with claiming rates in medical malpractice cases).

88. There is a remarkable lack of systematic data regarding claiming rates. Theodore Eisenberg, *The Need for a National Civil Justice Survey of Incidence and Claiming Behavior* (Nov. 12, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1305385>.

89. *See generally* SUSAN E. MAYER, *WHAT MONEY CAN'T BUY: FAMILY INCOME AND CHILDREN'S LIFE CHANCES* (1997) (discussing the high correlation between education and socioeconomic status).

all, then the application of the law cannot be dependent upon the capacity of victims to understand whether they *might* have a legal claim. A victim's understanding of whether he or she might have a legal claim should be the predicate to exercising his or her choice to make the claim or not.

In a few categories of cases, chiefly defined by whether they will support an active plaintiffs' class action bar, both rich and poor plaintiffs have no difficulty finding assistance in framing collective claims. Outside this realm, however, framing collective legal claims requires resources. There is a reason that there are far more lawyers making a living representing homeowners' associations than lawyers representing tenant organizations, albeit in some markets (e.g., Manhattan), there are enough upper-income tenants to make a fee-based practice possible for lawyers who represent tenants.<sup>90</sup> Moreover, upper-class people and their lawyers can hire specialists to assist them in deciding how to frame problems.<sup>91</sup> In short, equal access to justice means equal access to the knowledge regarding the various paths for achieving justice that run through the legal system.

### B. Effectiveness

The *effectiveness* argument for claims-framing assistance flows from the considerable evidence from many disciplines demonstrating that the frames through decision makers understand problems can have powerful impacts on outcomes.<sup>92</sup> The same event, such as the death of a child in an apartment fire, can be framed in terms of parental neglect, a slumlord's greed, or a deficient housing inspection program.<sup>93</sup> Although *all* of these causal explanations might be true, the one that becomes the dominant account will tightly constrain the possible responses—or whether there is a response at

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90. See, for example, the advertisements on the Tenant Net Web site, which focuses on New York City and New York State. Tenant Net, <http://www.tenant.net> (last visited Apr. 9, 2009).

91. Communications professionals, including those who work with nonprofit organizations, do much of this work. For example, the aptly named FrameWorks Institute provides fee-based "strategic frame analysis" to nonprofit organizations. FrameWorks Institute, <http://www.frame-worksinstitute.org> (last visited Apr. 9, 2009) (follow "Strategic Frame Analysis" hyperlink).

92. See CHARLOTTE RYAN, PRIME TIME ACTIVISM: MEDIA STRATEGIES FOR GRASSROOTS ORGANIZING 72–74 (1991) (explaining that the tenant-landlord frame, for example, can have a moral appeal and influence the outcome).

93. See *id.* at 55–56.



all. Of course, effectiveness can be measured from multiple standpoints and interests.

Furthermore, a poverty lawyer representing the child's parent might want to frame the problem as one of a failed housing inspection program to advance what he or she sees as the interest of other present and future clients, while the parent might insist on going after the owner of the building. Undoubtedly, the preferences of the parent—the client—should control. However, it seems equally true that genuine access to justice would enable the parent to have an informed discussion about the alternatives, rather than to effectively predetermine those decisions through the institutional design of delivery systems. It may well be that the grieving parent will want to help prevent similar tragedies in the future if he or she knows there are possible legal means to do so.

### *C. Efficiency*

Claims-framing assistance may also lead to greater *efficiency*. The availability of more efficient means of solving problems results in a greater pool of problem-solving resources available to the class of eligible persons. Although efficiency may not necessarily matter to a client receiving free assistance for one case, efficiency would preserve resources to assist the client with potential future problems. In our sample case, framing the problem of the Main Street tenants in terms of past landlord neglect turned out to be too narrow, at least in practice. Thus framed, the most we could accomplish would be to correct current problems and obtain some money damages for current tenants, leaving future tenants (and our own clients who remained Main Street tenants) to Dr. Avol's meager mercies. Also, with this framing, the greater problems would remain; many of the other apartments our clients could afford would be in almost as poor a state as the Main Street building.

In the Avol case, we excluded from the frame those future tenants whom Dr. Avol would harm if he maintained the same business practices in the same building, even if he were forced for a time to modify them. The result was that two different legal services agencies were required to deal with Dr. Avol and his agents in the same building in the later episodes I mentioned above. Moreover, we framed Dr. Avol as uniquely evil—a particularly egregious slumlord requiring special attention (that is, from us). Instead, he

could have been framed as one of the many slumlords requiring the attention of a well-functioning code enforcement system or a slumlord taking advantage of a housing crisis brought on by failures of housing policy at a government level. Due to our characterization, we missed the opportunity to expand the frame, and hence the resulting struggle, to get at more fundamental, systemic problems.

The result was that, over the years, we saw a lot more individual tenants with severe habitability problems that were only framed in legal terms because the tenants were defendants in eviction cases filed against them when they they refused to pay the rent in an effort to force their landlords to make necessary repairs. It would have been completely wrong, of course, for us to have chosen the route of affirmative litigation without a collaborative exploration of the possibilities with our clients in the building. However, our services were incomplete to the extent that collaborative exploration did not reach issues of code enforcement and government policy. In hindsight, our assistance was not quite the kind of affirmative representation to which I would argue everyone should be entitled, though it was much more than any individual tenant with a habitability case could, empirically, expect at the time.

#### V. ASSISTANCE IN OVERCOMING COLLECTIVE ACTION PROBLEMS: LAW AND ORGANIZING

Ms. Carbajal, the lead tenant plaintiff in the Avol case, did receive legal assistance aimed at achieving justice not only for her and her family in the short run, but also for all the tenants in the building over the longer (if not long enough) term. She was a remarkable woman, but long hours in a garment industry sweatshop did not leave her much time to organize her fellow tenants. For that, she needed some help, along with resources: a place to meet, help with copying and distributing flyers, and so on. The decision to do that organizing and to frame her problem as a collective problem was a collaborative decision, made easier by the fact that the landlord could not—as a matter of architecture and engineering—provide some of the relief she needed, like heating and plumbing systems that worked properly, to only one of sixty apartments. The organizing itself was also a collaborative affair between Ms. Carbajal and a core group of tenants, a tenant organization founded by a remarkable retired union organizer, Dino Hirsch, and lawyers and paralegals

from our office. Without those resources, the decision to frame Ms. Carbajal's problems at the building level would have been little more than an intellectual gesture and a matter of pleading. Under California law, we might still have filed her case as a class action, at least as to problems in the common areas and with building systems, but putting together the proof in the case required the cooperation and engagement of many more of the tenants in the building to provide the necessary facts to establish liability or reach a settlement. We were able to do more with what is called a "law and organizing" approach.<sup>94</sup>

However, in retrospect, perhaps we did not do enough. Among the many reasons we did not explore more expansive framings of the Main Street tenants' problem—the housing inspection system or redevelopment policy—was that we were lawyers and not organizers. There is some truth to the adage that lawyers are like small boys with hammers, except that they see everything as a possible lawsuit rather than as a nail. We only came to represent nearly all the tenants in the building with the help of organizers. Nevertheless, we stopped at the building level rather than going after housing inspection policy issues. Our decision generally reflected, in part, both our own limited framing and a narrower building-by-building approach of the tenant organizations at the time, which had not yet expanded to include neighborhood or city policy issues. Deciding otherwise would probably have been—for both lawyers and organizers—a matter of dialogic engagement with the Main Street tenants as well as other organizations and tenants with similar concerns. After that engagement, we might still have decided against expanding the frame. However, ultimately the tenants were entitled to have that discussion and to make an informed choice.

The potential relationship between lawyers and organizing is not, of course, new to legal scholarship. Near the birth of modern legal services, Stephen Wexler wrote:

Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it

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94. See generally Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 959–62 (2007) (describing the law and organizing movement and how it encourages lawyers to work within the community to seek nontraditional solutions to social injustice).

together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves.<sup>95</sup>

Three colleagues at UCLA have contributed both to the elaboration of this idea and to the critique of its implementation. Most examples of Gerald López's "rebellious lawyering" model presuppose the existence of a contiguous community in which organizing is or could be taking place.<sup>96</sup> Scott Cummings and Ingrid Eagly have highlighted strengths, weaknesses, and limitations of a law and organizing approach to client representation and more generally to social justice work.<sup>97</sup> These issues are beyond my scope here. My point is that true equal access to justice sometimes requires access to organizing in at least the limited sense of solving those collective action problems that make effective legal representation possible.<sup>98</sup>

### A. Equality

Generally speaking, people with more resources can use some of those resources to overcome collective action problems, just as they can hire people to help them consider alternative framings of problems, including collective frames. Of course, framing a problem in collective terms only raises the possibility of collaboration and coordination. Realizing such a possibility requires that complex of skills and activity called "organizing." Organizing does not necessarily require organizers or money to pay them. It does require, however, resources that poor and working people often lack, including time beyond that spent trying to survive, communications skills, and infrastructure (e-mail helps). By contrast, people with more resources (and their lawyers) can either hire organizers, pay dues to an existing organization, or use other means to deal with collective action problems.

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95. Wexler, *supra* note 45, at 1053.

96. See generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (discussing his activist model of lawyering).

97. See generally Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001).

98. An article I coauthored with education scholars provides one current example. Jeannie Oakes et al., *Grassroots Organizing, Social Movements, and the Right to High-Quality Education*, 4 STAN. J. C.R. & C.L. 339, 354 (2008).

In some cases, poor people *are* represented by means that do not depend on the charity of others. For example, there are low-wage unions that represent janitors, hotel workers, long-term care workers, and others—at least in some parts of the country.<sup>99</sup> Of course, in some cases, low-income people may be well represented as to some issues through religious organizations. The question in both of these instances is, represented as to what? Most unions represent workers only as to workplace issues, although there are some notable exceptions.<sup>100</sup> There are religious organizations with strong social justice leanings whose work in solving collective action problems goes beyond “right to life” (as limited to fetuses) issues. Systems providing full access to justice might take these alternative resources into account in particular instances, but they will not assume their existence where the facts are otherwise.

### B. Effectiveness

As I discussed in the section on framing in Part IV above, resolving some of Ms. Carbajal’s habitability claims *required* going beyond the walls of her apartment. Some of the problems in the building resulted from building-level deficiencies. Absent a collaborative effort with her neighbors, she had no real expectation of getting heat in the building or hot water for more than two hours a day. The costs of installing new heaters, boilers, and pipes in the building dwarfed the maximum expected value of any damages she and her family might recover. A profit-maximizing landlord would offer in settlement, at most, something approaching what he might lose at trial—the compensatory damages sustained by Ms. Carbajal and her children. At trial, no judge would have made wide-ranging and expensive injunctive orders that would primarily affect people not before the court.

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99. See RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT 1, 25, 65–66 (2006).

100. With colleagues in the UCLA Graduate School of Education and Information Studies, I am assisting SEIU Local 1877, the “Justice for Janitors” union in Los Angeles, working with and for their members who are parents or guardians of children in public schools to address public education issues. See also John S. Rogers & Veronica Terriquez, “More Justice”: *The Role of Organized Labor in Educational Reform*, 23 EDUC. POL’Y 216, 233 (2009). Union involvement is much more common in issues that connect more directly with employment, such as health care. *Id.* at 227.

Effective problem solving requires dealing with problems at the levels at which they are caused and then addressing those causes. Dr. Avol had no special animus toward Ms. Carbajal, at least until she sued him as lead plaintiff. To the contrary, he completely disregarded all of the tenants in the building so long as their rent checks were received by the first of the month. The problems in the building were caused by his business plan: to “milk” the building for cash rather than to treat it as an asset. Dr. Avol would be induced to alter his business plan only by changing his financial calculations in response to the threat of damages or by changing the nature of his calculations based on the prospect of prosecution for defying the court’s injunctive orders. However, our initial settlement left him in control of the building, and he was free to return to his original business model once he determined those risks had declined.<sup>101</sup>

Of course, not every potential legal problem is more effectively addressed by collective means. That determination can only be made in the very concrete contexts of particular problems affecting individuals and the groups of which they are a part. My point is that sometimes the most, and sometimes the only, effective solution requires collective action, and overcoming the obstacles to collective action often requires organizing as well as more extensive legal work. In those instances, effective access to justice requires access to those forms of assistance.

### *C. Efficiency*

Collective action is not always more efficient, just as it is not always more effective.<sup>102</sup> However, when it is effective, it is also likely to be more efficient for both poor people and those who provide the resources. From the perspective of some of the clients involved, particularly those with a leadership or organizing role, a

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101. Among the factors contributing to the declining risk to Dr. Avol was the fact that during the Reagan-era cutbacks in legal services, the office near the Main Street building was closed. In the second round of litigation against Dr. Avol, he gave up ownership of the building. However, he self-financed the sale to another owner. Upon that owner’s default, Dr. Avol was involuntarily back in control, leading to the third round of litigation.

102. In legal services practice, we sometimes conducted a thought experiment called “the Potato Test” before embarking on a major project. This test involved determining how many resources it would take to achieve the result we expected, and then asking a representative (and usually imaginary) group of clients, With these same resources, would you prefer that we take on this project? Or would it be better if we spent the same money on potatoes or rice to distribute in the community?

collective approach may take more of their time than an individualistic approach, just as most cases on behalf of individuals consume less advocacy time than larger-scale endeavors. What makes these endeavors efficient is that those resources result in the provision of benefits to many more people. First, there are often economies of scale of the kind that are the reason we have provisions in every state and in Rule 23 for class actions.<sup>103</sup> Often, injustices are significant but not significant enough to economically justify the costs of remediating them through the mechanisms that the law provides. They are remediable collectively or not at all. It would have been cheaper for the Legal Aid Foundation to help Ms. Carbajal move to another apartment than to bring an individual habitability case on her behalf. However, even with the shortcomings that I have described, we were able to obtain significant change in the lives of both Ms. Carbajal *and* her neighbors at a much lower per-family cost. Furthermore, although Ms. Carbajal and a handful of other tenants spent a good deal of time in meetings and the like, the average investment of time and accommodating inconveniences (like responding to interrogatories) was also less for the average tenant in comparison to the investment Ms. Carbajal would have had to make in an individual tenant action, assuming we had been willing to bring such an action.

Successful collective action problem solving can also be efficient for one of the reasons that makes it effective: solving problems at the source reduces the likelihood of their recurrence. Given the subsequent history of the Main Street building, it is clear that we were not as effective in this regard as we might have been. A more experienced team<sup>104</sup> might have recognized that Dr. Avol followed the same business model in his other buildings and would likely return to that business model if he retained ownership. Ousting Dr. Avol and replacing him with an ordinary landlord, as is now sometimes done through the imposition of receiverships in slum buildings, would have saved taxpayers and Dr. Avol's insurers a lot

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103. See FED. R. CIV. P. 23; *see generally* ABA, SURVEY OF STATE CLASS ACTION LAW (2007) (discussing the class action provisions in all fifty states), available at <http://www.abanet.org/litigation/committees/classactions/careview.html>. There are, of course, other justifications for class actions, including the avoidance of conflicting decisions.

104. Both Barbara Blanco and I were within thirty months of obtaining a license to practice law.

of money.<sup>105</sup> However, doing that would have required the same organization and help overcoming collective action problems that we provided, and without such assistance the tenants would probably have achieved no relief at all.

#### VI. ASSISTANCE BOTH IN SECURING REMEDIES AND ENSURING THAT REMEDIES ARE MEANINGFUL AND LASTING

I have written elsewhere regarding the importance of paying attention to outcomes in discussions of access to justice.<sup>106</sup> In that work, I referred to the actual outcomes of particular dispute resolution processes where access to justice is ostensibly provided. I was inspired to write the piece upon discovering, in a small study with students in one of my clinics, that in 151 eviction cases in which a tenant had asserted habitability defenses, not a single tenant prevailed unless he or she had a lawyer at trial, even though half of the tenants had received help through self-help clinics.<sup>107</sup> Where tenants had settled on the date of trial, these assisted tenants achieved a result no better than they could expect from losing at trial.<sup>108</sup> Of course, it is statistically possible that 151 out of 151 tenants deserved to lose on the law and the facts.<sup>109</sup> However, an examination of the housing code reports on the tenants' buildings suggested to us that a good number of the tenants' claims were well founded. *All* of the assisted but losing tenants received assistance from skilled professionals in a setting that has since rapidly multiplied across the country: the self-help clinic.<sup>110</sup> Did they achieve access to justice? It

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105. See generally Ryan Howell, Note, *Throw the "Bums" Out?: A Discussion of the Effects of Historic Preservation Statutes on Low-Income Households Through the Process of Urban Gentrification in Old Neighborhoods*, 11 J. GENDER RACE & JUST. 541, 563 (2008) (discussing how receiverships are used to revitalize impoverished neighborhoods by allowing neighbors and city authorities to force the owners of slum buildings to either maintain their property or risk losing it at a public auction).

106. See Blasi, *How Much Access?*, *supra* note 32, at 877.

107. *Id.* at 869.

108. *Id.*

109. More careful recent studies of the importance of lawyers in eviction cases have been controlled for case quality by utilizing a randomized control group. Seron, *supra* note 33, at 423. See also Rebecca L. Sandefur, Lawyer, Nonlawyer and Pro Se Representation and Trial and Hearing Outcomes (June 30, 2006) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=913426](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913426).

110. Of course, other self-help clinics may achieve better results. But we should not be surprised to learn that a few minutes of consultation, or even a much longer "trial preparation clinic," is no substitute for three years of law school and many prior experiences in a courtroom.



appears that they did not, if access to justice means having the assistance necessary to achieve a result consistent with the facts and the law applicable to a particular case. There may be some independent value to providing a subjective sense (even if false) that one has had a fair hearing, given the psychological (and sociopolitical) value of perceived or procedural justice.<sup>111</sup> One doubts, however, that the general public believes that *access to justice* should actually mean “access to the appearance or subjective feeling of justice.” Once we include outcomes as a part of the measure of justice received, the principle applies to all kinds of problems and assistance.

### A. Equality

Procedural justice may be important, but most people and businesses able to afford lawyers are looking for a result, not a feeling. Poor people should expect the same from any system promising access to justice. They are not as well situated, however, to know whether they have received effective assistance and a fair result that is consistent with the facts, the law, and the results achieved by others with greater means. Knowing what most people receive requires having information about more than one’s own case or problem. Repeat players—whether they are businesses with frequent contacts with the legal system or legal services organizations—have access to information (their own or that of the legal system). This knowledge pertains not only to what happens in a particular case but also to how cases can be compared with each other. Legal services organizations also have access to the information necessary to assess how their assistance affects outcomes across large numbers of cases. If banks, insurance companies, and large businesses can generate reports from this information—sometimes to assess how much they have legally extracted from poor people—then components of the justice system for poor people should be able to generate results from their own information as well.

Some legal services organizations maintain management information systems containing outcome data, at least in individual

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111. There is much literature on procedural justice. A good starting point is E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

cases. This data is often much harder to maintain in larger-scale matters that involve interests beyond money that may be more important. A big piece of litigation resulting in a consent decree or a major policy advocacy effort achieving a change in a statute may seem impressive—until one learns that absolutely nothing has changed on the ground and in the lives of the intended beneficiaries. Implementing changes may require many years in addition to active monitoring and engagement. Without monitoring, hard-won changes in illegal behavior or policy may soon give way to backsliding, retrenchment, and rights violations once thought to have been halted.

Businesses, organized labor, and organized interest groups pay attention over time to matters that affect them. Public interest lawyers do so more rarely. In the case of the Main Street building, once our office closed and we lawyers moved several miles away, we lost the natural organic monitoring we once had in the form of tenants coming to our office with questions or complaints. The building deteriorated dramatically before it again came to the attention of legal services lawyers.

Sometimes, though, public interest lawyers do better. Between 2000 and 2004, I was privileged to work with the team of lawyers and organizations that brought a statewide education class action case, *Williams v. California*,<sup>112</sup> that challenged the horrendous conditions and unequal resources available to approximately two million public school students in California.<sup>113</sup> At the conclusion of a successful settlement, the litigation team resolved to commit significant resources to staffing a full-time monitoring effort that would both assist in and assess the implementation of the settlement agreement.<sup>114</sup> Having that capacity has been invaluable both in working out complications with local school officials and in responding proactively to violations that might have otherwise accumulated until another lawsuit was required. In my experience,

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112. No. 312236 (Super. Ct. S.F. filed May 17, 2000).

113. See Cal. Dep't of Educ., *The Williams Case—An Explanation*, <http://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp> (last visited Apr. 9, 2009); see also AM. CIVIL LIBERTIES UNION FOUND. OF S. CAL. & PUB. ADVOCATES, INC., *WILLIAMS V. CALIFORNIA: THE STATEWIDE IMPACT OF TWO YEARS OF IMPLEMENTATION 12* (2007), available at <http://www.decentschools.org/settlement/WilliamsReportWeb2007.pdf>.

114. See Settlement Implementation Agreement, *Williams v. California*, No. 312236 (Super. Ct. S.F. dated Aug. 12, 2004), available at <http://www.cde.ca.gov/eo/ce/wc/documents/wmssettleagmt.pdf>.

institutionalizing monitoring and implementation functions is a rare occurrence, generally seen only when it is court-ordered as part of systematic injunctive relief.

Monitoring is rare, in part, because it requires resources, and the work may seem less challenging or important than winning a case or enacting a piece of legislation. The inattention to the longer term and actual outcomes also flows from the schema and frame that most lawyers have of a case. Cases tend to have a beginning, a middle, and an end. During litigation, there is at least one person (the judge) who is charged with enforcing procedural rules, which provide an orderly sequence of processes to move toward the end of a case. Whether a case is won is generally determined immediately at the conclusion of a settlement, trial, or appeal.

By contrast, in the world outside of the legal framework, even the Yogi Berra principle—"It ain't over 'til it's over"<sup>115</sup>—may not apply. Sometimes it is never "over." There is no final judgment rule in the real, multidimensional world of problems affecting poor people; there are no rules of procedure either suggesting or constraining subsequent actions. The occasions for appropriately declaring "mission accomplished" are, in both public interest law and military affairs, fairly rare. It may be easier for public interest lawyers to declare victories and not attend to monitoring results over the long term, if only because in poverty and public interest law there is seldom an analog to the company CEO, board of directors, or shareholders for whom the results matter. If those providing access to justice for the poor do not attend to results, then often no one (other than some more sophisticated funders) will do so, unless we conceive this work as integral to the provision of legal services.

### *B. Effectiveness*

To say that one must attend to results to know whether one is being effective seems an obvious tautology. But in the real worlds of nonprofit and pro bono legal services with which I am familiar, some organizations go on for years feeling effective without ever actually examining the empirical facts to validate that feeling. It really is a simple proposition, however. To paraphrase Samuel Goldwyn, an unenforced judgment, statute, or settlement agreement is not worth

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115. *E.g.*, THE YALE BOOK OF QUOTATIONS 58 (Fred R. Shapiro ed., 2006).

the paper it is written on.<sup>116</sup> Unless the point of the exercise is to obtain words on paper, then effectiveness *means* achieving more tangible results in the world in which clients live and communities exist. And that means knowing the results.

### C. Efficiency

Efficiency is also linked to results, which are the denominators of any cost-benefit calculation. It would be foolish to suggest that individual representation is always less efficient than affirmative or collective representation, particularly when individual representation is undertaken in a strategic way, in the model of Gary Bellow's "focused case representation" approach.<sup>117</sup> Nor do all, or even most, individual problems lend themselves to affirmative, collaborative, collective representation, although sometimes the threat of such representation can be used to obtain better results for individuals.<sup>118</sup> On the other hand, it is often more efficient to address the source of a problem than to deal seriatim with its individual consequences. This is true in the case of claims too small to justify the transaction costs of individual resolution, as in many consumer class actions. And it is also true in the case of larger problems, in which a thousand hours of lawyers' time and an infusion of organizing resources on behalf of a community or a class may achieve better results for more people than ten hours spent assisting each of five hundred—or even five thousand—individuals.

## VII. CONCLUSION

Any effective system for providing access to justice will necessarily include providing assistance by a variety of means to a large number of individuals priced out of the market for legal services. The point of this Article is to argue that any system meeting important goals of equality, effectiveness, and efficiency will also provide assistance in a few other areas: (1) exploring legal

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116. Samuel Goldwyn said, "A verbal contract isn't worth the paper it's written on." *Id.* at 317.

117. Bellow, *supra* note 45, at 106, 121–22.

118. One of the most effective lawyers I know represented his first clients as a student in a law school clinic. In representing consumers who had been wronged, he found it effective to explain to the opposing attorney, "We're not sure we want to settle. I can get extra credit if I can figure out how to make this a class action."

solutions where they are not immediately apparent; (2) overcoming obstacles to collective and collaborative action when necessary; and (3) attending to the longer-term consequences of larger efforts at problem solving.

Agreeing on these goals and the design features of a system of providing access to justice does not predetermine how those goals should be achieved. To the extent that poor people now have access to affirmative representation, such representation is provided through a variety of means, including (1) the plaintiffs' class action bar in a limited number of areas; (2) private civil rights firms that survive primarily on the proceeds of fee-shifting statutes; (3) a relatively small minority of legal services lawyers whose caseloads include such representation; (4) an increasing number of pro bono lawyers who have decided with their firms that solving problems on a large scale, just as they do for their business clients, is a better use of their skills; and (5) the occasional law school clinic. In working toward a better system, we should contemplate how to strengthen the efforts in all of these areas. On the other hand, we should not regard a system that has evolved through necessity and bricolage as relieving a government of laws of its obligation to see that everyone within its jurisdiction has reasonably equal access to the benefits and protection of those laws.