

# THE DUTY NOT TO DELIVER LEGAL SERVICES\*

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*Professor Galanter suggests that the traditional approach to providing legal services in terms of demand (legal needs) and supply (lawyer's services) is inadequate and that alternative methods of providing the benefits of law to everyone must be developed. Arguing that the inequities of the present system stem from the fact that litigation generally pits an individual party against an organizational party with the organization enjoying a sizable advantage, the author suggests that such alternatives as simple and accessible public forums, private sector tribunals, aggressive champions, more competent and organized parties, as well as various forms of augmented legal services may replace the delivery of traditional lawyers' services as the responsibility of the legal profession.*

## I. THE DUTY TO DELIVER WHATEVER IT IS THAT LAW IS GOOD FOR

Why should anyone have a duty to deliver legal services? Canon 2<sup>1</sup> speaks of the profession's "duty to make legal counsel available." In one common view, such a duty proceeds from the notion that law confers benefits, both on the society at large and on individuals, and that if these benefits are not secured, the remedy is to "make legal counsel available." That is the supply side—how the benefits of law are to be delivered. The demand side is visualized by the notion of legal need—the notion that we can specify the instances in which these benefits are not realized and thus compile a list of unmet legal needs. So legal services meet legal needs; the benefits of law will then be bestowed upon all and all's well with the world.

I would like to suggest some of the deficiencies of this view—both of its diagnosis of demand and its prescription of supply. In doing so, I shall move away from discussion on duty. I find it generally uncongenial to speak in terms of duty, even someone else's. I hope that some of the duty talk can be translated into talk

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\* The analysis in this paper draws heavily on the analysis in a prior paper written by Professor Galanter. Galanter, *Why the "Haves" Come Out Ahead: Speculations on Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

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1. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON NO. 2.

about options and opportunities. (We can return later to see if this tells us anything about duties.)

But let us start with duty. If there is a duty to make legal counsel available, it must derive from a larger duty to deliver to society and its members the benefits of legality. That is, if we were to speak of a duty to provide medical care, such an obligation would presumably derive from a duty to foster and maintain the health of the community and of individuals. Similarly, the legal profession presumably enjoys its privileged position because it is the repository of society's commitment to values of order, justice and fairness. Presumably, any duty that the profession owes stems from the commitment to these values. We know that ordinarily this duty is discharged by individual service to individual clients. However, lawyers are not insensible to various other means of securing these values to the public. Indeed, the bar's attempt to regulate the practice of law represents a massive collective undertaking to see that the benefits of law are delivered in proper fashion.

But before plunging into the problem of delivering legal services, let us ask what legal services are good for? What is law good for? We are talking about access to whatever law is good for. Whatever these benefits are, we suspect that they are not delivered as regularly or equally as we would like. But before we discuss ways to remedy this, let us attempt to specify the benefits that are being discussed.

Obviously, the presence of law confers benefits of various kinds on society as a whole—stability, channels for orderly change or perhaps efficient allocation of resources. I shall put aside these collective benefits for the moment and concentrate on distributive benefits: those which access to law presumably bestows upon actors, individuals or groups, within the society. Among these are surely such things as: (1) protection, security; (2) remedies for a variety of grievances and claims; (3) securing the accountability of officials; (4) participation in decision-making; (5) feelings of justice, fairness; and (6) employment of facilitative rules to accomplish a variety of purposes.

For the sake of convenience, I shall refer to these collectively as "legality," recognizing that the mix of goals will vary with the perceiver as well as with actors. It is presumably for the purpose of providing these that the profession enjoys privileges and has a "duty to make legal counsel available."

Much discussion of legal services seems to proceed on the as-

sumption that we can specify the instances in which these benefits are not realized and thus compile a list of unmet legal needs. There are reasons to suspect the adequacy of this approach. In a recent article Leon Mayhew has brilliantly analyzed the inadequacy of the "legal needs" way of conceptualizing the problem.<sup>2</sup> He cautions us not to assume that there are a set of claims and problems "out there" which fail to be met because legal services are unavailable.

Neither surveys of the experiences of the public nor the patterns of cases brought to legal agencies produce a particularly valid measure of the "legal needs" of the citizenry. Needs for legal services and opportunities for beneficial legal action cannot be enumerated as if they were so many diseases or injuries in need of treatment. Rather, we have a vast array of disputes, disorders, vulnerabilities, and wrongs, which contain an enormous potential for generation of legal actions. Whether any given situation becomes defined as a "legal" problem, or even if so defined, makes its way to an attorney or other agency for possible aid or redress, is a consequence of the social organization of the legal system and the organization of the larger society—including shifting currents of social ideology, the available legal machinery, and the channels for bringing perceived injustices to legal agencies.<sup>3</sup>

We should be grateful to Mayhew for the insight that legal needs are not some Archimedian starting point against which we can measure the adequacy of legal services, but are themselves the product of, among other things, the way in which the legal system and legal services are organized. He reports, for example, that in a survey of metropolitan Detroit in 1967, "less than one percent of the women interviewed . . . said they had ever been discriminated against by reason of their sex. . . ."<sup>4</sup> This response, he concludes, might have been different had the respondents

applied a higher level of legal and sociological imagination to the question . . . but the necessary attitudes and information for seeing such discrimination were then relatively undeveloped. Nor were there any well developed channels for routing cases of such discrimination to the attention of attorneys and legal agencies.<sup>5</sup>

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2. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 *LAW & Soc'y REV.* 401 (1975).

3. *Id.* at 404.

4. *Id.*

5. *Id.*

So "legal need" in such a case (or in the case of family problems or consumer problems) is itself a reflex of the opportunities and resources provided by the legal system. The "needs" to be filled, then, are not a primitive given, but an institutionally and ideologically contingent selection from a vast pool of amorphous "proto-claims."

Let us turn from demand to supply. If needs are contingent, it is similarly problematic whether any given set of needs can best be filled by provision of legal services. The tendency has been to assume that the deficiencies in access to law can most effectively be met by more and better legal services; that legal services are the key missing resource. I suggest that this is not always the case; that we must compare the costs and benefits of alternative ways of delivering legality and that (1) in some cases there are excessive costs to delivering legality through the medium of legal services, and (2) in some cases legal services are insufficient without some admixture of other factors. We then must contemplate a more complex field in which there are many possible sets of needs which might be served by a variety of alternative paths to the benefits of legality.

## II. ALTERNATIVE METHODS OF DELIVERING LEGALITY

I would like to address myself to some of these alternative options and strategies for performing the functions which, it has sometimes been assumed, could only be performed by legal services. For purposes of this analysis, I will make some gross simplifying assumptions about the legal system (including the assumption that such a "system" can be meaningfully isolated from its social context). However, for present purposes, let us think of that system as comprised of four elements or levels: (1) a body of authoritative normative learning—for short, RULES; (2) a set of institutional facilities (courts, administrative agencies, etc.) within which the normative learning is applied to specific cases—for short, COURTS; (3) a body of persons with specialized skill in dealing with the above—for short, LEGAL SERVICES; and (4) persons or groups with claims they might make to the courts with reference to the rules—for short, PARTIES.

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

then we shall face questions of assessing their relative costs and benefits.

(1) One may in various ways upgrade legal services. One may seek changes in the recruitment, training, or ideology of the professionals rendering such services; one may seek changes in the organization of the delivery of those services; and one may seek changes in the character of the services being offered. Obviously, there are vast possibilities for enhancing access to legality through provision of more, better, and new kinds of legal services. Because we have all heard so much about these issues, I want to talk not about legal services *per se* but about the way in which the other elements interact with legal services to amplify or diminish access possibilities.

(2) Another way to improve access is to change the rules. Changes at the level of rules can provide greater (or reduced) access. For example, a shift from individuated "fault" rules to "no fault" can provide access to remedies by diminishing the complexity and technicality of a claim, eliminating the need for difficult showings of fact, employment of experts and use of professional advocates. Furthermore, access to facilitative rules might be provided by the development of pre-formed standardized packages ("canned transactions") requiring minimal use of professional advice. These are examples of rule changes that deliver legality by reducing the need for legal services. Most rule-change is, it hardly needs be said, not of this kind. Typically, rule-change involves an increase in the complexity of the law and its remoteness from popular understanding and thus greater dependence on professionals to deliver its benefits.

Typically, legal professionals have overestimated the benefits that could be delivered through obtaining rule-changes from peak institutions, especially from courts. A vast literature has documented the constantly rediscovered and never-quite-believed truths that judicial (or legislative) pronouncements do not change the world; that the benefits of such changes do not penetrate automatically and costlessly to their intended beneficiaries; that often they do not benefit the latter at all. We have some notion of why rule changes produced by courts are particularly unlikely to be important sources of redistributive change.<sup>6</sup> Like everything else, favora-

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6. Favorable rule-change via the courts is an expensive process and the tradition and ideology of the courts limit the scale and scope of changes. In addition, rule changes at the court level do not penetrate automatically, costlessly and isomorphically to other levels

ble rules are types of resources and those who enjoy other resources tend to reap benefit from them. The basic question is how to enable parties to secure the benefit of favorable rules.

(3) There are a great variety of proposals for providing greater access through changes at the level of institutions. These might be sorted out in a number of ways. Let me suggest some of the major categories in terms of the departures they make from the model of our ordinary courts.<sup>7</sup>

(A) One classic response is to provide "small claims" courts—that is, courts with lower costs and simpler procedure, overcoming barriers of cost, locational accessibility, intimidation and incomprehensibility.<sup>8</sup>

(B) One might instead attempt to provide institutions that are mediative and compromise-seeking, rather than judgmental and imposing a win/lose outcome.<sup>9</sup>

(C) One might attempt to change the character of courts by creating tribunals that are more "popular," responsive and participatory rather than professional and alien, reducing the cultural and psychological distance between tribunal and parties.<sup>10</sup>

(D) One might instead encourage the development of tribunals in the private sector—such as the consumer forums operated by the dry-cleaners, the carpet industry, and the home appliance manufacturers,<sup>11</sup> or by the Better Business Bureaus. More of these

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because courts have less capacity than other rulemakers to allocate resources to secure implementation of new rules. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974); Hazard, *Law Reforming in the Anti-Poverty Effort*, 37 *U. CHI. L. REV.* 242 (1970).

7. I do not mention arbitration separately, since it is an omnibus category which might refer to developments under several of the headings discussed below.

8. For a critical analysis of the extensive small claims literature, see Yngvesson & Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 *LAW & SOC'Y REV.* 219 (1975).

9. Thus Nader and Singer call for "alternative forums to courts for resolving disputes between people whose relationships are ongoing, and thus subject to mediated solutions, reserving the courts for the one-shot, win-lose type of dispute . . ." Nader and Singer, *Dispute Resolution*, 54 *CALIF. STATE B.J.* 281 (1976). See also Danzig & Lowi, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 *LAW & SOC'Y REV.* 675 (1975).

10. For a comparative survey of the emergence of such "popular tribunals," see N. Tiruchelvam, *THE POPULAR TRIBUNALS OF SRI LANKA: A SOCIO-LEGAL INQUIRY* (Yale Law School Program in Law and Modernization Working Paper No. 27, 1973).

11. See, e.g., the thorough analysis of the now-defunct Carpet and Rug Industry Con-

may be spawned by the new FTC rules under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975.<sup>12</sup>

(E) Related to these are various devices that are not tribunals but champions—something half way between a dispute processing institution and an institution that provides representation. The ombudsman<sup>13</sup> and the media ombudsman<sup>14</sup> (Action Line, etc.) are the prime examples.

(F) Coming full circle, one may think of supplying institutions that are more “active”—i.e., that depart from the passive umpire role of courts to take investigatory initiative,<sup>15</sup> and to secure, assemble, and present proof,<sup>16</sup> to monitor performance, etc. Such proactive institutions would reduce the advantages of differential competence of the parties or their representatives. Advocacy of unrepresented interests may be built into the tribunal itself, as it was, for example, in early workman’s compensation boards.<sup>17</sup> The possi-

sumer Action Panel (CRICAP) by M. McDonald, CRICAP RESOLVED CONSUMER COMPLAINT AUDIT AND STUDY (Dec. 20, 1974).

12. 15 U.S.C. §§ 2301 et seq. (Supp., 1975).

13. See S. ANDERSON, OMBUDSMAN PAPERS: AMERICAN EXPERIENCE AND PROPOSALS (1969); D. ROWAT, THE OMBUDSMAN PLAN (1973).

14. Information on media ombudsmen (e.g., newspaper action lines or television action reporters) is rather slim. See Levine, *Better Than Deep Throat*, 7(2) Washington Monthly 42 (1975); B. SINGER, FEEDBACK AND SOCIETY at 41 (1973). Cerra, *Free “Action” Services A Help to Consumers—Well, Some*, N.Y. Times, Mar. 29, 1976, at 31, col. 1. For an interesting cross-cultural perspective, cf. Ramundo, *They Answer (to) Pravda* in LAW IN THE SOVIET SOCIETY (W. LaFave ed. 1965).

15. This is an application of Donald Black’s useful distinction between reactive mobilization of the legal process (i.e. on the basis of a citizen complaint) from proactive mobilization (i.e. in which officials proceed on their own initiative). See Black, *The Mobilization of Law*, 2 J. LEGAL STUDIES 125, 128 (1973).

16. Cf. Homburger, *Functions of Orality in Austrian and American Civil Procedure*, 20 BUFFALO L. REV. 9 (1970). For a description of more “active” courts, see Kaplan, von Mehren & Schaeffer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1443 (1958), and Homburger, *supra*. Of course, even among common law courts, passivity is relative and variable. Courts vary in the extent to which they exercise initiative for the purpose of actively protecting some class of vulnerable parties or developing a branch of the law.

17. P. NONET, ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY, at 79 (1969), describes the California Industrial Accident Commission:

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

In the American setting, at least, such institutional activism seems unstable; over time institutions tend to approximate the more passive court model. See Nonet, *supra* in chs. 6-7,

bilities here commend themselves to observers like Kimball and Whitford, who suggest that effective processing of high volume, low amount complaints may require abandonment of adversary processes and substitution of inquisitorial adjudication.<sup>18</sup>

(4) Finally, one may think of changes at the level of the parties. I submit that the fundamental problems of access to legality can best be visualized as problems of the capability of parties. That is, that lack of capability poses the most fundamental, as well as the most neglected, barrier to access and that, correspondingly, upgrading of party capacity holds the greatest promise for promoting access to legality. Party capability includes a range of personal capacities which can be summed up in the term "competence": ability to perceive grievance, information about availability of remedies, psychic readiness to utilize them, ability to manage claims competently, and seek and utilize appropriate help.<sup>19</sup> Recently we have had a major development in this line of inquiry by Douglas Rosenthal who found that superior results were obtained by "active" personal injury plaintiffs.<sup>20</sup>

Beyond these personal competences, there is, I submit, a related set of structural factors, including the size and organization of the party. The relevance of the structure of the parties may be gauged by reflecting on our common sense view of legal services. In a recent article the president of the new Legal Services Corporation described its goal as insuring "that the poor receive the same quality and range of service that is provided to the rich."<sup>21</sup> If we think of "the poor" as receiving the same "quality and range of service that is provided to the rich" we may have in mind the poor man writing

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and see generally M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION*, ch. 7 (1955), on the "judicialization" of administrative agencies.

18. Whitford & Kimball, *Why Process Consumer Complaints? A Case Study of the Office of the Commissioner of Insurance of Wisconsin*, 1974 Wisc. L. Rev. 639.

19. The personal competence notion has been set forth by Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. Rev. 381 (1965). See also *Nonet*, *supra* note 8.

20. D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974). "Active" clients were defined as those who expressed special wants to their attorneys, made follow-up demands for attention, marshalled information to aid the lawyer, sought quality medical attention, sought a second legal opinion, and bargained about the fee. Rosenthal found that such "active" clients were drawn disproportionately from those of higher social status, which presumably provided both the confidence and the experience to conduct themselves in this active manner.

21. Cramton, *The Task Ahead in Legal Services*, 61 A.B.A.J. 1339, 1342 (1975).

his will or pursuing his automobile injury claim in the same manner that his rich counterpart does. Well enough, but we would, I think be misreading the most central facts about the law in contemporary United States. The real disparities in the use of law and in the provision of legal services, I submit, are not between rich and poor individuals but between individuals and organizations. Legal contests (or non-contests) do not take place between rich persons and poor persons. They take place, for the most part, between individuals on the one side and large organizations on the other. Typically, the occasion is one of a kind for the individual; it is an emergency or at the least a disruption of routine, propelling him into an area of hazard and uncertainty. For the organization (usually a business or government unit), on the other hand, making (or defending against) such claims is typically a routine and recurrent activity.

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

(1) ability to utilize advance intelligence, structure the next transaction and build a record;

(2) ability to develop expertise and have ready access to specialists, economies of scale, and low start-up costs for any case;

(3) opportunity to develop facilitative informal relations with institutional incumbents;

(4) ability to establish and maintain credibility as a combatant; (i.e., interest in "bargaining reputation" serves as a resource to establish "commitment" to bargaining positions. With no bargaining reputation to maintain, the one-time litigant has more difficulty in convincingly committing himself in bargaining);

(5) ability to play the odds. The larger the matter at issue looms for the one-timer, the more likely he is to avoid risk (i.e., minimize the probability of maximum loss). Assuming that the stakes are relatively smaller for recurrent litigants, they can adopt strategies calculated to maximize gain over a long series of cases, even where this involves the risk of maximum loss in some cases;

(6) ability to play for rules as well as immediate gains. It pays a recurrent litigant to expend resources in influencing the making of the relevant rules by lobbying. Recurrent litigants can also play for rules in litigation itself, whereas a one-time litigant is unlikely to.

There is a difference in what they regard as a favorable outcome. Because his stakes in the immediate outcome are high and

because by definition the one-timer is unconcerned with the outcome of similar litigation in the future, he will have little interest in that element of the outcome which might influence the disposition of the decision-maker next time around. For the recurrent litigant, on the other hand, anything that will favorably influence the outcomes of future cases is a worthwhile result. The larger the stake for any player and the lower the probability of repeat play, the less likely that he will be concerned with the rules which govern future cases of this kind. Consider, two parents contesting the custody of their only child, the prizefighter versus the IRS for tax arrears or the convict facing the death penalty. On the other hand, the player with small stakes in the present case and the prospect of a series of similar cases may be more interested in the state of the law (e.g., the IRS, the insurance company, or the prosecutor).

Thus, if we analyze the outcome of a case into a tangible component and a rule component, we may expect that in any case, the one-timer will attempt to maximize tangible gain. However, if the recurrent litigant is interested in maximizing his tangible gain in a series of cases, he may be willing to trade off tangible gain in any one case for rule gain (or to minimize rule loss). We would then expect recurrent litigants to "settle" cases where they expected unfavorable rule outcomes. Since they expect to litigate again, such litigants can select to adjudicate (or appeal) those cases which they regard as most likely to produce favorable rules. On the other hand, one-timers should be willing to trade off the possibility of making "good law" for tangible gain. Thus, one would expect the body of "precedent"—i.e., cases capable of influencing the outcome of future cases—to be relatively skewed toward those favorable to the current litigant.<sup>22</sup>

It would appear that in general terms, organizations occupy a position of advantage in the configuration of contending parties. As might be expected, those who occupy this position of advantage tend to enjoy other advantages as well. Foremost among these are

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

massive disparities in the quality and quantity of legal services utilized by individuals and by organizations. Indeed, legal professionals in the United States can be roughly dichotomized into those who provide a limited range of services to individuals on an episodic basis and those who provide a wider range of services to organizations on a more continuing basis. Although there are many exceptions and irregularities, there is a pattern of massive difference in education, skill and status between these groups. There is also a massive difference in the quality of services provided. The profession is organized to provide a wide range of services to organizations and a much narrower range to individuals.

Are we to use as the standard of "quality, scope and character," of representation which a poor person is entitled, that which is supplied to General Motors or the Tobacco Institute? That would include a wide array of preventive and planning work as well as work in a variety of legislative and administrative arenas to secure favorable rules and avoid unfavorable ones. It is doubtful that either the Legal Services Corporation or pre-payment plans will be in a position to employ such a standard. To pose such a quixotic goal reveals more than the limitations of these worthy undertakings. It points to the fact that parties differ in their capacity to utilize legal services.<sup>23</sup> What is routine and rational for an organization is monstrous for an individual. If we take an isolated individual, with his claim or grievance or ambition, it is indeed a rare instance in which

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23. Legal services are one vehicle through which differences in party capability have effect, but we cannot reduce those differences to differences in the supply of legal services. First, the capacity to use law effectively is not something supplied exclusively by professionals and entirely separable from the parties themselves. Parties themselves can have different levels of capacity to utilize the legal services. For example, Douglas Rosenthal found that superior results were obtained by "active" personal injury plaintiffs. See text accompanying note 15 *supra*. A study of California small claims courts, in which lawyers were not permitted to appear, found that businesses that were frequent users "formed a class of professional plaintiffs who have significant advantages over the individual." Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

Further, there seems to be comparative evidence that major distinctions in party competence can exist quite apart from disparities in legal services. The reports of Kidder (Kidder, *Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India*, 9 LAW & SOC'Y REV. 11 (1974); Kidder, *Courts and Conflicts in an Indian City: A Study in Legal Impact*, 11 J. COMMONWEALTH POL. STUDIES 121 (1973)) and Morrison (Morrison, *Clerks and Clients: Paraprofessional Rules and Cultural Identities in Indian Litigation*, 9 LAW & SOC'Y REV. 39 (1974)) on litigation in India suggest a distinction between the "experienced" or "chronic" litigant and the naive and casual one which seems to be quite independent of the organization of legal services.

the kinds of options that are routine for a large organization will be feasible and effective.<sup>24</sup> In brief, these forums and the resources that one must marshal to be effective in them, are just the wrong size for individuals. For the most part, individuals have claims or grievances that are too small, relative to the costs of remedies, or too large, relative to their need to be risk averse. The basic problem of making individuals effective players of the law game is to find means of aggregating claims that are too small, or sharing (or dispelling) risks that are too large.

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

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

Another interesting pattern is the assignee-manager of fragmentary rights. The outstanding example that comes to mind is a performing rights association like the American Society of Composers, Authors & Publishers (ASCAP). This type of organization solves a problem that is not wholly unlike the problem of vindicating many consumer and environmental rights today. That is, that the holders of these rights have tiny fragments that are not worth the cost of remedies or the cost of monitoring to assure their performance.<sup>25</sup> This kind of alternative deserves more attention.

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24. *But see* Cramton, *supra* note 16. "If the client's interests are best served by negotiation and settlement, that course should be followed. But if litigation is necessary, it should be pursued to the hilt. An appeal from an adverse decision below should be taken when the interests of the client would be served. And participation in administrative or legislative proceedings may often be appropriate or necessary in order to advance or protect the client's interest." *Id.* at 1342-43.

25. Prior to 1914, individual authors, composers and publishers realized little in the way of royalties for the public performance of their compositions. It was impossible for individuals to maintain constant surveillance throughout the forty-eight states and to collect royalties for each performance of their musical compositions. It was also difficult for them to prosecute each establishment which performed their music without the payment of royalties. The problem of collecting royalties and protecting copyrights was met by joint action of the authors, composers and publishers. Where individual action could be sporadic and ineffectual,

Imagine, for example, if a large number of people assigned their various rights to be free of pollution or impure food to an association which would manage these rights, engage in appropriate monitoring activity, and could seek damages in instances of violation. One can think of a number of serious obstacles to such an effort, including rules against champerty, possible public policy limits on the assignability of such claims, and formidable difficulties of organization. (A device that bears some striking similarities is the collection agency which assembles many similar claims which can be handled in a routine fashion.) This kind of device would overcome some of the arguments raised against class actions—their cumbersomeness, the burden on the courts and their self-appointed “misrepresentation” of affected parties.

Finally there is the interest group-sponsor (e.g., NAACP, ACLU, and environmental action groups) which has had a major impact and will undoubtedly continue to do so. However, none are able to provide regular and dependable service to individuals; nor is their deployment of legal resources accountable to the constituency on whose behalf they speak.

All of these means of aggregation involve the formation (or utilization) of organizations. An organized group is not only better able to secure favorable rule changes in courts and elsewhere, but is better able to see that good rules are implemented.<sup>26</sup> An organization can expend resources on surveillance, monitoring, threats and litigation that would be economically infeasible for any individual. Such a group would enjoy the strategic advantages that accrue to recurrent organizational litigants. In America, at least, law is a complex and expensive activity requiring employment of full-time specialists. Organizations can use the law rationally and routinely because they are the right size.

But organization is not cheap. Organizing such a group represents an outlay of money, energy, attention, and entrepreneurial

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combined resources and vigilance and concerted threats of prosecution for copyright infringement enabled the copyright owners to force the many users to pay for the public performance privilege.

Finkelstein, *The Composer and the Public Interest—Regulation of Performing Right Societies*, 19 *LAW & CONTEMP. PROB.* 275, 284 (1954), quoting complaint in *United States v. ASCAP*, Filed June 23, 1947, (S.D.N.Y.), Civil Action No. 42-245, Para. 9.

26. See, e.g., L. MAYHEW, *LAW AND EQUAL OPPORTUNITY: A STUDY OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION* 168-73 (1968) (discussion of the greater strategic thrust of group sponsored complaints in the discrimination area).

skill. For various reasons a class of claimants may be relatively incapable of being organized. Its size, relative to the size and distribution of potential benefits, may require disproportionately large inputs of coordination and organization.<sup>27</sup> Or a shared interest may be insufficiently respectable to be publicly acknowledged (*but cf.* the example of homosexual groups). Or individuals may have no permanent or predictable identification with a particular interest, but occupy various positions interchangeably (e.g., home buyer and seller, automobile driver and pedestrian). Because few interests are likely to impel organization on their own account, the input of organization will in most instances have to come from groups that are already organized for other purposes.

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

Perhaps the most widespread of all aggregation devices is governmentalization; utilizing the criminal law or the administrative process to make it the responsibility of a public officer to press claims that would be unmanageable in the hands of private grievants. This is typically a weak form of aggregation, for several reasons. First, there is so much law that officials typically have far more to do than they have resources to do it with. Therefore, they tend to wait for complaints and to treat them as individual

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27. Olson argues that capacity for coordinated action to further common interests decreases with the size of the group: "Relatively small groups will frequently be able voluntarily to organize and act in support of their common interests, and some large groups normally will not be able to do so. . . ." M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 127 (1965).

Where smaller groups can act in their common interest, larger ones are likely to be capable of so acting only when they can obtain some coercive power over members or are supplied with some additional selective incentives to induce the contribution of the needed inputs of organizational activity. (On the reliance of organizations on these selective incentives see Salisbury, *An Exchange Theory of Interest Groups*, 13 *MIDWEST J. POL. SCI.* 1 (1969); Clark & Wilson, *Incentive Systems: A Theory of Organizations*, 6 *ADMIN. SCI. Q.* 129 (1961)). Such selective incentives may be present in the form of services provided by a group already organized for some other purpose. Thus many interests may gain the benefits of organization only to the extent that those sharing them overlap with those with a more organizable interest (consider, e.g., the prominence of unions as spokesmen for consumer interests).

grievances.<sup>28</sup> Second, enforcers have a pronounced tendency not to employ litigation against established and respectable institutions.<sup>29</sup> Consider the reaction of Arizona's Attorney General to the litigation initiated by the overzealous chief of his Consumer Protection Division, who had recently started an investigation of hospital pricing policies.

I found out much to my shock and chagrin that anybody who is anybody serves on a hospital board of directors and their reaction to our hospital inquiry was one of defense and protection.

My policy concerning lawsuits . . . is that we don't sue anybody except in the kind of emergency situation that would involve [a business] leaving town, or sequestering money or records. . . . I can't conceive any reason why hospitals in this state are going to make me sue them.<sup>30</sup>

The class action may also be thought of as a device for securing the benefits of organization. It attempts to secure the benefits of scale without undergoing the outlay for organizing. Clearly its scope is going to be more limited than many had hoped. And its costs and benefits compared to other aggregating devices remain to be measured.

The search for ways to provide legality propels us into unexplored terrain. We face choices between alternative paths of providing legality—simple and accessible public forums, private sector tribunals, aggressive governmental champions, more competent and organized parties, as well as various forms of augmented

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28. See, e.g., L. MAYHEW, *supra* note 21 (antidiscrimination commission); McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. CRIM. L.C. & P.S. 463 (1968); Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107 (1975) (consumer fraud and complaint bureau); cf. P. SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 225 (1969) (observations on a general "tendency to turn enforcement agencies into passive recipients of privately initiated complaints . . . . The focus is more on settling disputes than on affirmative action aimed at realizing public goals.").

29. E.g., The Department of Justice position is that the penal provisions of the Refuse Act, 33 U.S.C. § 407 (1971), should be brought to bear only on infrequent or accidental polluters, while chronic ones should be handled by more conciliatory and protracted procedures, 1 ENV. REPTR. CUR. DEV. No. 12 at 288 (1970); Goldstein & Ford, *The Management of Air Quality: Legal Structures and Official Behavior*, 21 BUFF. L. REV. 1 (1971) (patterns of air pollution enforcement).

30. *N.Y. Times*, April 22, 1973, § 1, at 39, col. 1; cf. Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 MICH. L. REV. 793 (1975) (examining the means by which public interests are represented in civil proceedings).

legal services. Obviously the choice in any given case will have to depend on a detailed assessment of costs and benefits. I stress here the importance of informing ourselves about alternatives so that such assessments can be made. We need to guard against automatically assuming that providing lawyers' services is the most appropriate way to solve the problem. Generally, I suspect, lawyers are an expensive way, and one that carries the not inconsiderable danger of promoting dependence on professionals.

### III. CONCLUSION

The duty to promote access to legality may sometimes imply a duty to supply legal services on an individual client model. But if there is a responsibility to provide access to legality in the most effective way, it may in other cases imply a duty to provide access in some alternative form. One may, in many cases, arrive at an obligation *not* to supply legal services—at least not in the manner referred to in Canon 2 as “mak[ing] legal counsel available.”

This leads us back to the question of the responsibility of the profession. Will the legal profession define its responsibility broadly to encompass development of all the paths to legality, or will it confine its responsibility to the provision of legal services in the narrower sense? Will it take as its responsibility the provision of access to legality through various means, or only by means of its own special product, individual legal advice and representation? It is difficult to separate prescription from prediction here, for one can only guess at these trends.

One may find in the broader vision exciting possibilities for diversification. Obviously lawyers could contribute a great deal to the design, management and monitoring of new institutions (grievance procedures, mediation boards, complaint bureaus) and serve as catalysts-advisors-managers of various kinds of organizations around specific legal interests. The bar is a vast storehouse of knowledge and seasoned judgment about how remedies and participation may be effectively secured. It seems likely that the innovators and entrepreneurs who develop and disseminate these new devices will be drawn from the ranks of lawyers.

So far, I join Raymond Marks<sup>31</sup> in expecting the profession's

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31. Marks, *A Lawyer's Duty To Take All Comers, and Many Who Do Not Come*, 30 U. MIAMI L. REV. 915 (1976).

contribution to be distributive rather than collective. One should not place great store in hopes that a group as diverse and composite as the American legal profession will make it a collective endeavor to provide legality, or even legal services for that matter. However, one would expect that professionally imposed barriers to provision of legal services would fall in response to competition from other forms of access. Raymond Marks suggests as an alternative the notion of an individualized duty, but there remain crucial questions before the profession as a whole. For example, how much will it permit or encourage the development within itself of a segment that concerns itself with these other ways of delivering legality—a decision that might in the long run affect the shape and scale of the profession.

One might imagine a collective undertaking by the profession to promote such developments. Or one might imagine the role of the profession as the more modest and passive one of permitting and encouraging such entrepreneurial activity by a group of innovators within the profession. In the first scenario, the profession collectively embraces and implements a broad view of access to legality. Perhaps some day it will, but I believe that in the short run its role will be more restricted. What it may contribute is general authorization for innovative development and forbearance from retaliatory restriction. This will be no small thing; resistance can be expected because these new devices are clearly substitutes for lawyers' services (or at least consume them in very different forms).

I do not regard such a development as foreclosed. Lawyers in the United States do not constitute a tightly knit, well-disciplined professional guild of courtroom advocates, providing a narrow range of services to clients from whom they remain aloof. Such a legal profession might find itself unable to make room for the kind of activity visualized here. But that is not a description of the legal profession in the United States, which is distinguished by its diverse and protean character, willingness to undertake new tasks, to operate in a wide range of institutional settings, to engage in an intensive division of labor, and to form enduring alliances with clients. Precisely because the profession offers, in practice if not in theory, more license to identify with clients and their causes, and a less restrictive sense of the boundaries of professional activity, it is more ready—or at least able—to serve an enlarged notion of professional responsibility. Such a responsibility may even encompass a duty *not* to provide legal services when there are more effective paths to legality!