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SYMPOSIUM - ACCESS TO JUSTICE

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## Access to Justice: Some Historical Comments

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# Access to Justice: Some Historical Comments

Lawrence M. Friedman

## **Abstract**

This article sets out some preliminary thoughts on what “access to justice” might mean, and comment on how access to justice has fared historically.

**KEYWORDS:** access to justice, history, civil law, criminal law

## ACCESS TO JUSTICE: SOME HISTORICAL COMMENTS

*Lawrence M. Friedman\**

This is a symposium on access to justice, a symposium with contributions from quite a few distinguished experts. Here, at the outset of the conference, I want to set out some modest preliminary thoughts on what “access to justice” might mean, and comment on how access to justice has fared historically.

We have to begin with some attempt to explain what we are talking about. What do we mean by “access to justice”? In order to answer that question, we have to ask some other, more basic, questions: who is supposed to have access; to what; and for what purpose?

Today, when people talk about “access to justice,” it seems to me that they have a particular image in mind. They are thinking of a person, or an organization, with some sort of legitimate claim or complaint. The question is whether there is a realistic and practical way of turning this claim into reality, and of pursuing this complaint. For criminal defendants, the claim is to a fair and honest trial or some similar proceeding. Another aspect—and an important one—is access to *information*. In England, there are advice bureaus that inform people about their legal rights. In this country, more and more, the web serves up information that is often quite rich and accurate.

We can ask, also, what is the “justice” we are referring to in the phrase “access to justice?” Does it mean the formal judicial system, so that siphoning off cases or shunting them into other arenas is arguably a denial of access to justice? Most people would not accept this position. There is no need to equate justice *solely* within the formal judicial system. There are many other methods of resolving disputes—arbitration, mediation, and so on—which may work better, and even more justly, than resorting to the formal court system. These alternatives are not necessarily a good thing. Mandatory arbitration, as we all know, can be, and has been, criticized on a

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number of grounds. Access to this kind of alternative way of settling a dispute would not be access to justice, at least in certain circumstances.

So far, we have talked about access to justice in basically procedural terms. But the phrase can also mean something quite different. “Justice” might refer not to an institution or a process, but to a concrete result—that is, “justice” in the sense of a fair outcome, or getting one’s due. The Supreme Court of the United States has suggested that it is valid (constitutionally speaking) to execute an innocent man, as long as he has had a fair trial.<sup>1</sup> I suspect most ordinary people, as long as legal training has not mangled their minds, would find this both bizarre and revolting. Justice to most of us is, above all, an outcome.

The people who work to improve access to justice are usually concerned about the problems of specific people or groups. They are thinking about the poor, or the middle class, or both. They are thinking about a miscellaneous collection of downtrodden, unpopular, or marginal people—whether they are Gypsies, convicted criminals, aliens, high school students, or members of unpopular religious sects. Thus, the ideal program of activists who want to increase access to justice would be to empower those individuals and groups who are somehow prevented from getting their just deserts.

Improving access to justice can be, in short, a procedural or an institutional issue; and, at the same time, a substantive issue. It is also very much a matter of economics. Justice can be expensive. If justice is too expensive, it has to be subsidized. This is the essence of the famous *Gideon* case, which is discussed below. The ideal system of justice would be cheap and convenient, open to the claims of the underdogs, and would give participants, within reason, what they want—provided that what they want is what society agrees they ought to have. Cheapness and convenience, while obviously important, are hollow and meaningless without a working system of relevant rights. We can give people, for example, the right to a hearing, a free lawyer, and all the rest, but if the legal rules and practices are dead set against our man, due process is not much help.

This is not idle conjecture. In the history of legal systems, cheap and convenient courts have not been rare. In fact, it is the modern, formal, slow, and expensive systems that are exceptional. Tribal justice is quick and cheap. Anthropologists have studied quite a few native systems of dispute resolution and have never reported on instances where it takes two years to hear a case. Justice among these people is usually what Max Weber called khadi justice—the informal folk-justice of the wise man sitting

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1. See *In re Davis*, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting).

under a tree.<sup>2</sup> Historically, justice has usually been speedy and inexpensive.

We do not have to visit tribes in the South Seas, or in the Amazon jungle, to find this kind of justice or something like it. The rich, full records of American colonial courts also document a system that was cheap, quick, and within everyone's reach. In the tiny towns of New England in the seventeenth century, local courts were extremely accessible—and not only accessible, but accessed in fact. One could almost compile an accurate census of a given town just by listing the people who appeared in court records during a particular year. Practically all adults came to court, or were dragged into court, at one point in time for some purpose. For the nineteenth century, one might also mention the courts of frontier communities, or Alan Steinberg's study of the courts of Philadelphia,<sup>3</sup> or, for that matter, municipal courts, police courts, and justice courts almost everywhere—all of these tended to be examples of cheap and accessible legal systems.

One could also mention small claims courts. The idea behind the creation of these courts was to open the courthouse doors to the little guy. Small claims courts were supposed to dispense simple, modest justice, without lawyers and the hassle of formal procedures. The little guy was indeed present in these courts, but more often as defendant rather than as plaintiff. Small claims courts often acted as glorified collection agencies: companies valued them as a cheap way to collect debts; collection agencies often appeared and filed suit.<sup>4</sup> This situation, while a key function of the courts, was not at all the goal of crusaders for access to justice. These courts, however, were frequently useful to consumers in disputed cases.<sup>5</sup>

Access to justice is not just a matter of courts in the basement of the house of justice. Many legal developments in the late twentieth century had a real impact on access to justice. Laws were passed that opened the way into the legal system for the underdogs, or the lawyers who

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2. See MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 213 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., Simon & Schuster 1954) (1925).

3. ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880 (1989).

4. Steven Weller, John C. Ruhnka & John A. Martin, *American Small Claims Courts*, in SMALL CLAIMS COURTS: A COMPARATIVE STUDY 5, 9-10 (Christopher J. Whelan ed., 1990).

5. See Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515 (1984) (a study of a Canadian small claims court). Collection cases were by far the most frequent when there was a default judgment but consumers contested some cases and, on the whole, did well.

represented them. Civil rights laws are a striking example. These laws came about because of massive social change, aided and abetted by strong social movements, including the civil rights movement, the feminist movement, and many other movements demanding rights for aliens, illegitimate children, students, prisoners, sexual minorities, Native Americans, elderly people, and handicapped people. The main outlines of this development are familiar to everyone. Also worth noting here is the so-called liability explosion in the law of torts and claims for wrongful dismissal from a job. These legal changes had one crucial element in common: they empowered *plaintiffs*; and plaintiffs were, on the whole, the little people, the underdogs, the disadvantaged. This is also true of products liability and medical malpractice. Obviously, you don't have to be poor to be incinerated in a defective automobile, or sliced and diced by a careless surgeon; even those not usually disadvantaged become the little guy in the face of giant corporations or huge hospitals and their insurance companies.

Civil rights laws empowered victims, invented substantive rights, and gave them teeth—the Voting Rights Law, for example—and quite literally created rights of access. The Civil Rights Act established an Equal Employment Opportunity Commission and invited people to file their claims with the agency; thousands of people have done so.

Modern government is administrative government—completing work, on the whole, through boards, agencies, and commissions. In the United States, more so than in many other countries, the bureaucracy has to reckon with interest groups and the general public. Proposed rules and regulations have to be published in the Federal Register. Often, the agency holds public hearings and invites comments from the public. Citizens and pressure groups have many chances to voice their opinions, and they often do: labor unions, public interest law firms, employer trade associations, and environmental protection organizations are all likely to weigh in on proposals for administrative action. And there is fertile soil here, too, for litigation. Robert Kagan has called the American way of law adversarial legalism.<sup>6</sup> It has its costs and benefits. The system is extremely slow and inefficient compared to administrative processes in most other countries, but it is almost pathologically open. In some situations, there is so much access that plans, projects, and rules die a slow and lingering death, smothered by lawsuits and murdered through litigation.

This, then, is a complex situation. “Adversarial legalism” grants access to the administrative process. This can be a good thing when the process

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6. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

delays or kills bad projects; but the same fate can befall good projects. One also wants to ask the more general question: how much access to justice do we really want? Let us try to imagine a world in which everyone who had any claim whatsoever could get a hearing, had inexpensive and convenient access to counsel, and presumably could get his claim resolved in his favor. Would this be a good society? It could be an Orwellian nightmare.

There are millions of disputes or potential disputes in society that never get resolved. Often, it is simply not worth the time and money to resolve them. Suppose you live in a large apartment building. You play music, a bit loud maybe, until ten o'clock at night. A neighbor, who goes to bed at nine, complains and asks you to please stop. You politely refuse, which ends the matter most of the time. Suppose the neighbor could easily, without cost or fuss, bring you before some sort of apartment tribunal. In some socialist countries, peoples' courts took advantage of informer networks, nosy neighbors, and government spies, to control or harass citizens. But this is not likely to make for a better society. There are times and places where complexities such as cost and fuss have virtues, such as preventing outbursts of small, annoying claims and disputes that would be better off forgotten. A more complex system might be called a system of reciprocal immunities: your neighbor, for example, cannot sue you and you cannot sue him—at least not easily.

I want to stress that I am not generalizing this situation to cover the whole legal system. I am certainly not trying to criticize the movement to increase access to justice. I am entirely sympathetic with this movement. I merely want to raise some questions and point out some limits.

As we know, most disputes never turn into grievances or claims or complaints. Actual litigation is the tip of a pyramid, while the broader base of the pyramid consists of a vast number of incidents that might conceivably turn into claims, but usually do not. This was the finding of the well-known Wisconsin study of civil litigation.<sup>7</sup> No one argues that the pyramid currently has the optimal shape; we can imagine a pyramid with different dimensions which would be more to our liking—more people would have more access to justice—and these people would be, on the whole, the people we want to help. But we cannot have a system that provides unlimited access to justice; the pyramid must remain a pyramid rather than become a square.

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

The reader will object, correctly, to increased access to justice in matters such as disputes among neighbors, or the use of small claims courts as collection agencies, or even the multiplicity of divorces—but this is not really what we are talking about. We are talking about giving the poor and the downtrodden access to justice. We want to unlock the courtrooms and other institutions to give these new “customers” a chance to say their piece and assert their claims of right. We are talking about empowering the poor and downtrodden, not in order to start legal quarrels with their neighbors, but to give them tools and weapons against the high and mighty: corporations, government agencies, big landlords, and chain stores.

This is the heart of what people mean when they talk about access to justice. But should we also help people in their claims against each other? Sometimes this may be useful. The long-term dispute over easy or hard divorce is really a dispute about one form of access. Because many people were committed to the notion that divorce was evil, law and practice kept divorce difficult and expensive. The enemies of divorce were, for years, rather successful—not in preventing the disintegration of families, but in preventing disintegrating families from taking advantage of this branch of law.

Over the years, however, divorce has become more democratic. In England, only Parliament could grant a divorce until 1857. That meant no divorce at all, practically speaking, except for the occasional duke or prince or merchant baron. Parliament finally passed a divorce law in 1857, which somewhat broadened access to divorce. It shifted the forum for divorce from Parliament to the courts. But divorce remained hard to get and extremely expensive—a deliberate choice because nobody wanted to encourage divorce.

The situation in the United States was much more complex. Divorce was available in almost every state (South Carolina was an exception) by the late nineteenth century, but it was an adversarial lawsuit: a plaintiff had to allege “grounds” for divorce, a lawyer was essential, and it was significantly costly.

Then, in 1970, California passed a no-fault divorce law, making divorce, compared to before, both cheap and easy. The new law, which quickly spread to other states, increased access to the divorce courts for ordinary people. Yet, the consequences are unknown. Does easy divorce hurt families? Many people argue that marriage should be a life-long commitment; troubled couples should try to work out their problems instead of running to the divorce court. On the other hand, whether a tough divorce law actually keeps families from breaking up is extremely dubious.



The general point could be put this way: many rules, procedures, and institutions affect access to justice. Some make it easier, some make it harder. Do we always want easier access? That depends, first of all, on who the “we” might be. Access for one person, A, might be good for A but bad for his opponent, B. Even if we know who the “we” might be, whether access is good or bad for society is situation-specific. There is no general answer to the question. It depends on where one’s sympathies lie.

Take, for example, the development of the contingent fee. It is more than a century old. It has been severely criticized at times; but it survives. Without it, many men and women would be unable to sue for injuries in accidents, and only those who could afford a lawyer’s hourly rates would be likely to go to court. The contingent fee, then, in a real sense increases access to justice in tort cases.

The same point can be made about *some* class actions; they aggregate clusters of claims that otherwise would not or could not be brought. Despite the benefits provided by the class action mechanism in some contexts, there is significant backlash against class actions and many kinds of tort actions. Millions of people, encouraged by the media and by business interests, think that the tort system has run amok. The case of the woman who bought hot coffee at McDonald’s and spilled it on herself is (mis)taken as a prime example of what’s wrong with our legal order.<sup>8</sup> To many people, such as business leaders, conservatives, doctors petrified of malpractice, and municipalities frightened of lawsuits, the problem here is too much access, too many lawsuits. The result, it is said, is not justice but economic inefficiency and waste.

On the other side, there is, for example, the well-known case, *Ledbetter*, which the Supreme Court decided in 2007.<sup>9</sup> Lilly Ledbetter worked at a plant in Alabama from 1979 to 1998, mostly as an area manager. She filed a claim with the Equal Employment Opportunity Commission (“EEOC”), complaining that men doing similar jobs earned more money than she did, in violation of the Civil Rights Act. She won her case before a jury, but, by law, any challenge to an employment practice had to be filed with the EEOC within 180 days of the discriminatory practice. The Supreme Court said, by a five to four margin, that this meant Lilly Ledbetter could complain only about discrimination in the last three months of her job.

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8. Michael McCann, William Haltom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113 (2001); see also Robert Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, 11 STUD. L. POL., & SOC’Y 95 (1991).

9. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

The majority claimed, perhaps a bit disingenuously, that they were simply applying the statute “as written.”<sup>10</sup> One hundred and eighty days means one hundred and eighty days. It cannot mean years and years. Congress might have had good reasons to attach a short time limit. The provision might have reflected a “strong preference for the prompt resolution of employment discrimination allegations.”<sup>11</sup> Evidence of discriminatory intent “may fade quickly with time,”<sup>12</sup> making cases harder to prove or disprove.

The dissenters accused the majority of a callous disregard of life in the real world. People are usually quite secretive about their pay rates—pay disparities “often occur . . . in small increments”<sup>13</sup> and a woman’s suspicion about discrimination “develops . . . over time,”<sup>14</sup> in this type of case.

The decision was widely criticized, often on the grounds that it was unrealistic, but perhaps that is a misunderstanding. The majority side simply might not like this kind of case because their sympathies are with business defendants besieged and harassed with discrimination suits. For business defendants, the fewer of these cases the better. Justices who agreed would be tempted to read the statute as narrowly as possible in order to cut off annoying and unjustified lawsuits. In this instance, Congress disagreed with the Court and passed a law to undo the *Ledbetter* case.<sup>15</sup>

The *Ledbetter* issue is a general issue of access—or of encouraging or discouraging lawsuits. The access issue lies behind several decisions, including those about standing, statutes of limitation, and lawyers’ fees (particularly in cases brought by public interest groups).<sup>16</sup> The literature, the legal profession as a whole, and probably most of the public express the view that litigation is something evil, something to be avoided. Settling out of court is always, or almost always, preferable. Undoubtedly, there is a lot to be said for this idea, but the emphasis on settling cases is not always politically neutral. What of the view that class action cases are usually an unjustified nuisance put together by lawyers hungry for business? The most strident criticism hails from the right end of the political spectrum. If you believe that the business of America is business, then class actions are usually a plague on the system, rather than an example of justice at work.

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10. *Id.* at 642.

11. *Id.* at 619.

12. *Id.* at 631.

13. *Id.* at 645 (Ginsberg, J., dissenting).

14. *Id.*

15. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

16. *See, e.g.,* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Servs., 532 U.S. 598 (2001).

I could multiply instances, but the central point is simply that who gains and who loses is the heart of the matter in cases involving access to justice. This is no secret. It is rarely accidental (or purely technical) to cut off access or to make it tough and costly. These are policy decisions, whether explicit or implicit. Nor is access to justice a question of procedure alone. It cannot be reformed merely by tinkering with institutions. Of course, there can be marginal improvements, but if you define the present situation as a problem, then the solution must come from broad, deep, lasting social change. There was, for example, little or no access to justice for African-Americans in the South until the 1950s. There is much more today—and anyone trying to explain the before and the after in terms of procedural niceties, or technicalities of legal process, is making a grave mistake.

### *Criminal Justice*

In criminal justice, there is one clear-cut issue: due process. The United States Constitution—to be more precise, the Bill of Rights—is much concerned with protecting the rights of people accused of crimes. The Bill of Rights is basically a mini-code of criminal justice—many of its provisions relate to criminal trials and this was no accident. The provisions arose out of a climate of fear of political influence on the judicial system. The rebellious colonists thought that justice in the hands of the King and his agents was an instrument of tyranny. They also thought it would be folly to hand criminal justice over to a new central government without safeguards against abuse.

Once the country was independent, fear of the central government did not last long. By the late nineteenth century, people saw danger to society, not from a strong central government (there was none), but from the criminals themselves—the home-grown dregs of society. The enemy was not Washington, D.C., but thugs, low-lives, and criminals of all sorts. The passion for due process went to sleep and was revived only in the age of the civil rights movement, which, in turn, was part of a broader revolt of the underdogs.

The story, however, is quite complicated. Any discussion of the subject has to pay homage to *Gideon v. Wainwright*,<sup>17</sup> a shining light from the Warren court. Clarence Gideon, charged with a serious crime, was too poor to hire a lawyer, and asked the court to provide one.<sup>18</sup> Florida, his ju-

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17. 372 U.S. 335 (1963).

18. *Id.* at 337.

risdiction, did not provide for counsel in such cases.<sup>19</sup> The Supreme Court reversed Gideon's conviction on the grounds that, in serious cases, the state must provide a lawyer for the indigent.<sup>20</sup> Defending a criminal case is tough, technical work. The Court felt that the right to counsel provided by the Bill of Rights demanded some provision for a state-paid lawyer if the defendant had no money. On retrial, with a skilled lawyer, Gideon won an acquittal.<sup>21</sup>

*Gideon* and cases like it rest on the assumption that the criminal defendant is helpless without a lawyer's help. Access to (criminal) justice would be otherwise meaningless. *Gideon* came out of Florida and showcased the Supreme Court in one of its most useful roles: crafting a national standard to be imposed on states that are statistical outliers. By the 1960s, most states had long since recognized the right which *Gideon* made general; and the federal government, in 1938, accorded that right to *federal* prisoners.<sup>22</sup> In 1942, in *Betts v. Brady*,<sup>23</sup> the Supreme Court declined to impose the *Gideon* rule on state courts, yet the Court soon began to have second thoughts. In 1949, in *Gibbs v. Burke*,<sup>24</sup> the defendant, Gibbs, was arrested in Pennsylvania for larceny and pleaded not guilty. He had no lawyer and tried to conduct his own defense.<sup>25</sup> The jury convicted him, and the judge sentenced him to "imprisonment in the Eastern State Penitentiary at solitary confinement and hard labor for two and a half to five years."<sup>26</sup> The Supreme Court reversed on appeal on the grounds that, while under *Betts* there was no automatic right to counsel, "where the ignorance, youth, or other incapacity of the defendant" would make a "trial without counsel unfair" there is indeed such a right.<sup>27</sup> Gibbs's trial did not measure up to the standard of due process. The case was a straw in the wind; *Betts v. Brady* was formally overruled in *Gideon*.<sup>28</sup>

In the states, probably the first stage in the development of the right to counsel was a recognition that courts could, in their discretion, provide a lawyer for a criminal defendant. In an old Indiana case, *Webb v. Baird*,<sup>29</sup>

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19. *Id.*

20. *Id.* at 339-40.

21. *Gideon v. Wainwright*, 153 So. 2d 299 (Fla. 1963).

22. *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938).

23. 316 U.S. 455 (1942).

24. 337 U.S. 773 (1949).

25. *Id.* at 774.

26. *Id.*

27. *Id.* at 780.

28. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

29. 6 Ind. 13 (1854).

Baird, a practicing attorney, sued to collect twenty-five dollars for defending one Thomas Wickens, who had been indicted for burglary. Baird had done this work “under the order and by the direction of” the Circuit Court of Tippecanoe County.<sup>30</sup> The Supreme Court of Indiana thought it was inconceivable, in a “civilized community,” that “any citizen . . . put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such.”<sup>31</sup>

In some states, the courts appointed attorneys to represent indigent defendants. The first state to have full-time, paid public defenders was California in the 1920s. The idea came from Clara Foltz, the first woman lawyer in the state. A number of other states followed the lead of California. All this took place long before *Gideon*.

*Gideon* was important, nonetheless—not only because it forced the national standard down the throats of laggard states, but because it was part of a package of cases in which the Warren court tried to improve criminal justice. The famous case, *Miranda v. Arizona*,<sup>32</sup> also was significant with regard to the issue of access to justice. *Miranda* was an attempt to curb the vast discretion of the police, which was often abused. There was a great deal of outright brutality as well as more subtle psychological coercion—these tactics were designed to induce defendants to confess, both by fair means and foul. The Warren Court felt that justice inside the courtroom and during the trial would be too little and too late without some safeguards at the time of arrest.<sup>33</sup> Defendants should know they have a right to remain silent and a right to refuse to answer questions.<sup>34</sup>

The chief complaint against *Miranda*—and, to a degree, against the other Warren court cases (though not *Gideon*)—is that these decisions hamstring the police. Most ordinary people probably approve of police discretion and police power. The police know how to handle criminals and sometimes rather harsh measures are useful or even necessary. The right to beat up suspects, and to cover up this practice, is not found in any criminal code, but public indifference or outright approval provide cover for police

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30. *Id.* at 14.

31. *Id.* at 18. In a case decided the year before in Indiana, *Blythe v. State*, 4 Ind. 525 (1853), the court of Common Pleas had assigned James E. Blythe, an attorney, as counsel to defend a man charged with larceny. Blythe refused to do this unless he was paid; the court found him guilty of contempt. The Supreme Court of Indiana reversed on the grounds that the trial court had no right to order Blythe to work without getting paid. *Blythe*, 4 Ind. at 525.

32. 384 U.S. 436 (1966).

33. *Id.* at 467.

34. *Id.* at 467-68.

behavior. Historically, vague laws against vagrancy, loitering, disturbing the peace, and the like also expanded police discretion. These laws gave the police the (apparent) right to sweep undesirables off the streets. The victims of these sweeps had no recourse, no right to complain, at least nothing with any practical value.

Criminal justice practice has moved some distance from those bad, old days. Today, the police are less lawless, although each year there are enough brutality scandals to make one wonder. The overall questions remain: how much due process can society afford? How much is desirable? How much access to justice do people deserve when they are accused (often correctly) of breaking the law?

Most people would answer with a sliding scale. A man or woman facing the death penalty requires a lot more lawyerly protection than somebody facing a fine for a parking ticket. Indeed, even in the days before *Gideon*, Florida law acknowledged that the state had the duty to help a person who was accused of a capital crime. In fact, by 1931, every state provided for some sort of assignment of counsel if a poor person faced a possible death sentence.

Whether people actually get enough help in these cases, and in criminal justice in general, is quite dubious. In November 2008, *The New York Times* reported a kind of revolt “in at least seven states,” by public defenders who refused to take on new cases, “citing overwhelming workloads.”<sup>35</sup> Budget cuts had pushed them to the breaking point.<sup>36</sup> In death penalty cases, the problem is much, much worse. These are difficult cases under any circumstances. Modern death penalty statutes, complex and involute, make them even more difficult. There is a good deal of evidence that defendants very often do not get good lawyers and good lawyering in these cases. Inadequate counsel may serve as grounds for reversing such cases. In 2003, the Court in *Wiggins v. Smith* did exactly this: the quality of the defense, the court felt, fell below minimal constitutional standards.<sup>37</sup> In general, however, courts have been loath to reverse on grounds of inadequate counsel. Moreover, even with skilled lawyers at work, the pay is often sub-par and there is no money to buy the services of forensic experts. The state, on the other hand, can spend and spend if it wishes.

There is no mystery here, any more than in the civil cases. The public demands toughness in criminal justice. The death penalty is fairly popular

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35. Eric Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

36. *Id.*

37. 539 U.S. 510 (2003).

in most states. The men and women on trial are not the kind of people the rest of us sympathize with. Society would probably be better off without some of them. The public is impatient with the niceties of due process. Can you think of a movie or a TV show which glorified due process, access to justice, and the heady strictures of the Bill of Rights? There may be a few, but very few. On the contrary, most movies and TV shows fall into one of two categories: either they glorify the law and order side, and imply that killing off the bad guys is a good thing, or they show the police as just as dishonest and corrupt as the criminals. This cynicism makes it more difficult to run a fair, honest system and justifies a kind of vigilante attitude toward crime and disorder.

In the 1983 movie, *Star Chamber*,<sup>38</sup> Michael Douglas plays a judge in Los Angeles presiding over the trial of two vicious criminals who raped and killed a young boy. Douglas's character finds himself forced to let them go on a technicality. Later, he finds out about a group of judges who meet secretly at night, retry the bad guys they had to let go in the daytime because of technicalities, sentence them to death, and arrange for a hitman to kill them. Douglas's character joins the group. There is a twist at the end, which I will omit in case readers might want to rent the movie. What is interesting is that the movie portrays judges who operate their own private death squad with the utmost sympathy, at least at first. Despite the ending, the movie never so much as hints that the "technicalities" are good for society; quite the contrary.

In conclusion, access to justice is a complex issue, both in civil and criminal justice. Access to justice is not merely a matter of procedure. Nor is the problem one of technical failings in the house of justice. The issue is deeply substantive and normative. A solution to the "problem" depends on how the problem is defined and what policy goals one wishes to reach.

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38. STAR CHAMBER (Twentieth Century Fox 1983).