

# ACCESS TO JUSTICE FOR FOUR BILLION: URBAN AND ENVIRONMENTAL OPTIONS AND CHALLENGES

BY

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## INTRODUCTION

### A. *Access to Justice: Who, How and When?*

The phrase “access to justice” invokes a wide range of questions. They include the following: What kind of access is sought? For whom and on what terms? Does access provide personal agency, or does it need to be mediated and secured by a third party? And what is the “justice” to which one is entitled to access, exactly? Does the justice to which someone is entitled, for example, require only that he be heard, or does it imply the assurance of some right or set of rights beyond that? Can access to justice be provided when someone else speaks for one to secure a right he enjoys but that is being denied to him?<sup>1</sup> Clearly, a single article cannot address and disentangle these and many related questions at once. Nonetheless, this Article undertakes to tackle some of the complicated and challenging questions surrounding access to justice at least as they relate to one set of questions, namely collective and diffuse urban and environmental claims. In doing so, the Article does not pretend to be exhaustive; it cannot be.<sup>2</sup> However, I nonetheless hope that the Article can contribute

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<sup>1</sup> See DEBORAH L. RHODE, ACCESS TO JUSTICE 3–19 (2004) (observing different conceptions of how best to provide justice access); James P. George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 315 (2006) (noting unresolved questions); see also, e.g., Diego Américo Robles, *El Concepto de Acceso a la Justicia*, in EL ACCESO A LA JUSTICIA: CONTRIBUCIONES TEÓRICO-EMPÍRICAS EN Y DESDE PAÍSES LATINOMERICANOS 29–32 (Sonia Boueiri Bassil ed., 2010).

<sup>2</sup> Indeed, scholars devote their careers to the subject, resulting in an outpouring of books and articles. Two of the most notable are Deborah Rhode

usefully to the debate about what we seek to achieve when we talk about providing “access to justice” on an increasingly urban planet—and, in the process, assist in the complicated task of making “justice” more widely available.

The above questions are particularly pressing for the estimated four billion people in the world who lack access to legal means for the safe and efficient resolution of disputes and claims.<sup>3</sup> Moreover, to a considerable extent the disputes that affect a significant portion of this population involve property and environmental concerns. For billions of people, insecurity in long-term work opportunities and access to consistent housing promotes precarious living conditions.<sup>4</sup> In addition, for many if not most of this population, the insecurity and fragility of their situations is

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and Mauro Cappelletti. For a sampling of their productions on the topic, see RHODE, *supra* note 1; Mauro Cappelletti, *Acceso A La Justicia. Programa De Acción Reformadora Y Nuevo Método De Pensamiento*, 16 BOLETÍN MEXICANO DE DERECHO COMPARADO 797–814 (1983) [hereinafter Cappelletti 1983]; Mauro Cappelletti et al., *Access to Justice—Variations and Continuity of a Worldwide Movement*, 54 REV. JUR. U.P.R. 221 (1985) [hereinafter Cappelletti et al.]; Bryant G. Garth & Mauro Cappelletti, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFFALO L.R. 181 (1978) [hereinafter Garth & Cappelletti, *Access to Justice: The Newest Wave*]; Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227 (2014) [hereinafter Rhode, *A Roadmap for Reform*]; Deborah L. Rhode, *Whatever Happened to Access to Justice?* 42 LOY. L. A. L. REV. 869 (2009); Deborah L. Rhode, *In the Interests of Justice: A Comparative Perspective on Access to Legal Services and Accountability of the Legal Profession*, 56 CURRENT LEGAL PROBLEMS 93–121 (2003) [hereinafter Rhode, *In the Interests of Justice*].

<sup>3</sup> See United Nations Development Programme (UNDP) and Commission for the Legal Empowerment of the Poor, *Making the Law Work for Everyone*, v. 1 at 4–6 (2008) [hereinafter CLEP Report v. 1]; see also Maurits Barendrecht & Maaïke de Langen, *Legal Empowerment of the Poor: Innovating Access to Justice*, in THE STATE OF ACCESS: SUCCESS AND FAILURE OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES 252 (Jorrit de Jong and Gowher Rizvi, eds., 2008) [hereinafter Barendrecht & de Langen] (“The Commission on Legal Empowerment of the Poor takes a somewhat different approach to legal empowerment because the main problems that the commission focuses on are poverty and exclusion, which, it argues, are intimately related. The rallying cry of the Commission on Legal Empowerment of the Poor is that 4 billion people in the world are excluded from the rule of law. This indicates that the agenda of the commission is broader than access to justice alone, because it looks at exclusion from the rule of law more broadly. . . .”).

<sup>4</sup> See UNITED NATIONS POPULATION FUND, UNFPA STATE OF WORLD POPULATION: UNLEASHING THE POTENTIAL OF URBAN GROWTH 38 (2007); Franz von Benda-Beckmann, *Legal Pluralism and Social Justice in Economic and Political Development*, 32 IDS BULLETIN 46, 46–47 (Jan. 1, 2001) (maintaining that property rights and distribution remain a very unaddressed part of debate about role of rule of law in achieving economic growth).

worsened by living in unhealthy and even dangerous physical and built environments, suggesting that the possibility to change those conditions would lead to more dignified, productive lives.<sup>5</sup>

To examine this situation, this Article proceeds in five parts. Part I considers four prominent theories on the meaning of “access to justice.” To be sure, the lines and divisions between these positions are in practice less rigid than this text will at times suggest. Nonetheless, the four approaches are sufficiently different from one another to justify a critical evaluation. Part I therefore undertakes to provide such an evaluation of these different proposals. In this, Part I seeks to assess the strengths and weaknesses of the different proposals with respect to the search for answers to some of the questions related to what “access to justice” means, identified at the outset above.

Part II then focuses more narrowly on the question of urban and environmental rights. It undertakes to briefly lay out what I take to be the principal claims for urban and environmental rights that have gained traction throughout the modern world, notably the claims for the right to the city and for environmental justice. I suggest that the reach of these claims is especially relevant to a discussion of the meaning of the phrase “access to justice.” The claims directly invoke rights, yet the answer to what exactly it means to enjoy one’s right to the city or to assert a claim for environmental justice often remains unclear.<sup>6</sup>

The focus on urban and environmental rights is useful for at least three reasons. First, the world is now a majority urban

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<sup>5</sup> See generally, CITIES ALLIANCE & PREFEITURA DA CIDADE DE SÃO PAULO, SLUM UPGRADING UP CLOSE EXPERIENCES OF SIX CITIES (Cities Alliance 2008); see also, e.g., Lyla Mehta et al., *Editorial: Environmental Governance in an Uncertain World*, 32 IDS BULLETIN 1, 1–8 (Oct. 2001).

<sup>6</sup> In the environmental justice context, for instance, there has long been a tension between more traditional, technical solutions and solutions that left direction of strategy and demands to the affected communities. The pioneering environmental justice attorney, Luke Cole, articulated the latter view with great force a generation ago. See, e.g., Brent Newell, *Remembering Luke Cole*, 25 J. ENVTL. L. & LITIG. 3 (2010); Luke W. Cole, *The Theory and Reality of Community-Based Environmental Decisionmaking: The Failure of California’s Tanner Act and Its Implications for Environmental Justice*, 25 ECOLOGY L.Q. 733 (1999); Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 FORDHAM URB. L.J. 523 (1994); Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991 (1992); Luke W. Cole, *Empowerment as the Key to Environmental Protection*, 19 ECOLOGY L.Q. 619 (1992). Some of the challenges in asserting individual claims to aspects of the right to the city are discussed *infra* notes 136–138 and accompanying text.

planet.<sup>7</sup> This significant demographic shift has manifold consequences for both the physical and built environments we inhabit and effects our liberties and lives at every turn.<sup>8</sup> Second, by virtue of the nature of the difficulties and possible harms created by urban and environmental problems, urban and environmental rights affect us both as individuals and as members of distinct communities, thus putting to the test some of the different approaches to securing access to justice described in Part I.<sup>9</sup> Third, by their nature, most urban and environmental rights claims affect not scattered individuals, but large swaths of people located in cities, towns and regions. In sum, then, the urban and environmental rights focus arguably responds to areas of our common experience that are creating new social and legal challenges, in turn demanding new legal responses rather than solutions honed over past decades. As a result, in Part II I will argue that the way to think about access to justice in the urban and environmental rights context tends to require arguments in favor of collective and diffuse rights, which will be discussed more fully below.

Part III then analyzes the challenges for securing access to justice in the urban and environmental context in terms of leading theories defining “access to justice” identified in that Part. Part III also offers normative suggestions as to the best means to provide access to justice for the vindication of urban and environmental rights. The conclusion lays out next steps.

### B. *Background*

Before proceeding to identify the different theoretical positions for what constitutes “access to justice,” it is important to

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<sup>7</sup> See U.N. HUMAN SETTLEMENTS PROGRAMME, GLOBAL REPORT ON HUMAN SETTLEMENTS 2009: PLANNING SUSTAINABLE CITIES xxii (Earthscan 2009).

<sup>8</sup> I am thus excluding rural settings in which land and environmental rights are a matter of struggle. I do not mean to diminish their importance but have so chosen to limit my area of attention. On such disputes in rural settings, see, for example, Chao Zhou & Dan Banik, *Access to Justice and Social Unrest in China's Countryside: Disputes on Land Acquisition and Compensation*, 62 HAGUE J. ON RULE L. 254 (2014).

<sup>9</sup> In Rhode's work, for example, when she focuses on groups she almost always refers to the individual needs of persons similarly situated (e.g. by income status, disability, race or ethnicity), rather than of the need to provide services that would assist the advance of claims those individuals suffer together, as members of a collective. See, e.g., Rhode, *In the Interests of Justice*, *supra* note 2, at 93–121.

provide a brief historical view of the modern development of the term and debates surrounding it. Much of the current discussion about the meaning of “access to justice” stems from the eponymous movement, the origins of which date back to the mid-1960s.<sup>10</sup> The debates—and the movement associated with them—intensified into the 1970s and 1980s.<sup>11</sup> Concurrently, and importantly for the latter part of this analysis, this period also saw the rise in rule of law and development approaches that reflected dissatisfaction with more conventional international institution-led approaches (such as the United Nations and World Bank) to legal reform in less-developed and undeveloped countries.<sup>12</sup>

Implicitly, these parallel and sometimes overlapping movements sought to combat the recognition that imbalanced power relations led to inequitable justice provision across the globe.<sup>13</sup> As a result, the now-dominant theories for what “access to justice” should mean seek, in different ways and with varying intensity, to redress legal and other related service and fairness

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<sup>10</sup> See Garth & Cappelletti, *Access to Justice: The Newest Wave*, *supra* note 2, at 196.

<sup>11</sup> Even in the mid-1970s Cappelletti recognized the growing importance of what we now call collective and diffuse rights claims. See, e.g., Mauro Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 MICH. L. REV. 793, 880 (1975) [hereinafter Cappelletti, *Governmental and Private Advocates*] (“A premise of the preceding discussion is that in modern societies new general, collective, ‘public’ needs and interests have been forcefully emerging. Such needs and interests are an outgrowth of the most basic characteristics of our twentieth century ‘civilization.’ Whether we like it or not, modern societies are characterized by mass production, mass commerce and consumption, mass urbanization, and mass labor conflicts, all of which require regulation. These new, pressing needs and interests must find access to the courts.”).

<sup>12</sup> See Barendrecht & de Langen, *supra* note 3, at 262 (surveying criticisms of law and development approaches for the last four decades); see also Jorge L. Esquirol, *The Geopolitics of Constitutionalism in Latin America*, in CONSTITUTIONALISM IN THE AMERICAS: STUDIES IN COMPARATIVE LAW AND LEGAL CULTURE 79, 90–91 (Colin Crawford & Daniel Bonilla Madonado eds., 2018) (criticizing consequences of law and development approaches for perceptions of Latin America). Compare LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 10–14 (2007) [hereinafter HAMMERGREN, *Envisioning Reform*] (surveying some of the external support for judicial reform efforts in Latin America and questioning its premises). See generally LINN HAMMERGREN, JUSTICE REFORM AND DEVELOPMENT: RETHINKING DONOR ASSISTANCE TO DEVELOPING AND TRANSITION COUNTRIES (2014) (examining failures of foreign aid donors to promote judicial access efforts).

<sup>13</sup> See, e.g. Cappelletti et al., *supra* note 2, at 258–59 (noting the global recognition of enforcement failures).

imbalances to create more opportunities for those with less to secure rights.<sup>14</sup>

### I. ACCESS TO JUSTICE: THEORETICAL POSITIONS

Theoretical positions on what constitutes “access to justice” differ greatly—unsurprising, given the imprecision of the words “access” and “justice.” But the positions share several features in common. First, they share a concern that in most places and at most times, the less privileged members of a society are those who are not able to access justice<sup>15</sup>—no matter what “justice” is understood to mean.<sup>16</sup> Second, all positions agree that access to justice, no matter how small or large involves expenditures of time and money that most people would prefer to avoid.<sup>17</sup> Third, and equally as important, the act of securing justice typically incurs costs such as emotional stress whose effects on individuals, and reverberations felt by the larger society, cannot easily be measured.<sup>18</sup> Fourth, accessing justice, again often irrespective of the nature or size of the issue that leads to the desire for access, can be complicated, involving many social actors with effects on a wide array of individuals.<sup>19</sup> These shared aspects of the theoretical

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<sup>14</sup> Cappelletti 1983, *supra* note 2, at 799, 804.

<sup>15</sup> See, e.g., CLEP Report v. 1, *supra* note 3, at 15 (“In too many countries, the laws, institutions, and policies governing economic, social, and political affairs deny a large part of society the chance to participate on equal terms. The rules of the game are unfair. This is not only morally unacceptable; it stunts economic [development] and can readily undermine stability and security. The outcomes of governance—that is, the cumulative effect of policies and institutions on peoples’ lives—will only change if the processes of governance are fundamentally changed.”); see also, Frank S. Bloch, *Access to Justice and the Global Clinical Movement*, 28 WASH. U. J.L. & POL’Y 111, 117–121 (2008) (describing role of university-based legal clinics in expanding access to justice as a means to promote social reform across the world).

<sup>16</sup> See Jorrit de Jong & Gowher Rizvi, *The Caste and the Village: The Many Faces of Limited Access*, in THE STATE OF ACCESS: SUCCESS AND FAILURE OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES 8–11 (Jorrit de Jong & Gowher Rizvi eds., 2008). Alfred Aman, in a similar vein, pushes us to ask what the consequences are for access to governmental services generally in a world where such services are increasingly privatized, leading to what he labels a “democracy deficit.” Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 49 UCLA L. REV. 1687, 1708–09 (2002).

<sup>17</sup> See, e.g., Maurits Barendrecht et al., *How to Measure the Price and Quality of Access to Justice?* 4 (2006) [hereinafter *Access to Justice Study Group*], <http://www.hiil.org/publication/how-to-measure-the-price-and-quality-of-access-to-justice>.

<sup>18</sup> See, e.g., *id.* at 7–8.

<sup>19</sup> See, e.g., *id.* at 5–6, 12.

positions seeking to defend access to justice must be remembered in the discussion that follows, because they inform the nature of each theoretical response.

In the debate about the phrase's meaning, at least four prominent positions can be identified. Two of the positions come from commentators who believe that, on balance, in a well-run society, law is an end in itself. Those associated with this theoretical position can therefore be labeled the "law-focused" access to justice theorists. For this camp, access to justice requires promoting the rule of law for its own sake in the first instance, with a resulting focus on the construction and refinement of legal institutions.

Within the "law-focused" camp, one can identify two different positions. The first of these is the more paternalistic one, consisting of those who argue that the priority must be to focus on what might be called the "mega-structure" of legal institutions. This group works from the top-down to transmit the values and build the structures necessary to provide justice. The second law-focused sub-group, by contrast, argues that this work must be done from the bottom up, building upon an articulation of individual values.

Distinct from the "law-focused" camp, a third group of commentators argues that law and its institutions are not ends in themselves, but rather that they are a means to an end. This group is focused on societal justice in the largest sense, valuing an accessible legal system as one tool among many to improve justice. For this camp, therefore, legal institutions and the rule of law matter principally to the extent that they fulfill other, defined goals, such as guaranteeing freedoms that allow people to live their lives unfettered by the controls of others or that allow resource distributions that improve the quality of lives. I call this the "integrated with law" position.

Finally, I call the fourth theoretical position the "integrated without law" theorists, or, more precisely, the "integrated without necessarily focusing on law" theorists. This group does not believe that law is always essential to assure justice or provide access to it. In other words, this fourth group believes that justice may be accessed, depending on context and circumstance, outside of the rule of law itself.

This Article will now consider each of these four camps. For the purposes of comparing these different theoretical positions, the analysis will identify the principle that apparently justifies the



position, then articulate the goal that it seeks to achieve (that is, the answer to the question, “What constitutes access to justice?”) and, finally, identify the method that the position advocates to achieve that goal.

#### A. *Law-Focused and Top-Down*

These theorists, led in the United States by Deborah Rhode and perhaps most closely identified outside the United States with the Italian scholar Mauro Cappelletti (albeit a generation ago), adhere to the principle that access to justice means the provision of comprehensive legal services available to all members of a society. This position, which has been widely influential and much discussed in the legal literature, not only in the United States but elsewhere,<sup>20</sup> holds that the provision of such comprehensive services is essential for a healthy, functioning society.<sup>21</sup> The goal, therefore, is to correct for inequities by providing a wide range of equivalent legal services for all people, irrespective of their resources. The underlying assumption here is that solid legal service provision will redress imbalances of social and economic power and lead to a fairer society. Clearly, this is an ambitious goal, one that both requires a high degree of consensus about the values that matter most and a good deal of social engineering to build the requisite institutional architecture. For this reason, I classify its approach as top down.

The theory has traction at both national and international levels. In the United States, for example, the State of Massachusetts has formalized this approach with the creation of an Access to Justice Commission, the aim of which is to ensure widespread legal services.<sup>22</sup> Writing in the mid-1980s, one celebrated group of scholars who supported this view observed as follows about the appeal of such ideas internationally:

The substantive law has increasingly been manipulated in recent decades to enforce governmental policies; and now there has been a strong tendency to manipulate procedural law and institutions with those same policies in mind. One of those policies, quite clearly, consists simply in favoring access to

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<sup>20</sup> See generally Marta Infantino, *Integration Through Comparative Private Law: Four Lessons from Cappelletti*, 14 INT. J. CONST. L. 492 (2016) (evaluating Cappelletti’s influence).

<sup>21</sup> See generally Rhode, *supra* note 2.

<sup>22</sup> See MASSACHUSETTS ACCESS TO JUSTICE COMMISSION, <http://www.mass2j.org/a2j/> (last visited Mar. 22, 2018).

lawyers and the institutions necessary to resolve disputes and enforce legal rights.<sup>23</sup>

By 2010, even an institution like the World Bank, one whose original mandate had nothing to do with legal service provision, could be found advocating the importance of access to legal services in rule of law projects aimed to help lift people from poverty.<sup>24</sup>

If the principle underlying this position is that strong, fair, orderly societies are undergirded by well-functioning legal systems, the goal is to realize this theoretical ambition by providing legal services of equal quality to all. This raises the question of what, exactly, constitutes legal services. As the language cited from Cappelletti above suggests, for many years the focus was on widening access to lawyers in traditional advocacy roles. Subsequently, however, there have been arguments to expand this definition to focus on other efforts, including conciliation activities (alternate dispute resolution, for example) and reforms of the legal profession, requiring, for one, expanded pro bono service for those without means to hire a lawyer.<sup>25</sup>

Importantly, this is a position that tends to focus on individuals and not groups, stressing the need to concentrate on the defense of individual liberties and rights.<sup>26</sup> This is not, however, uniformly true. Cappelletti himself noted the different proposals from those in this camp (in which he could be included) that focused on group needs, including those who advocated for free legal services (or “judicare”) and those who focused on more broad-based interventions in favor of group claims—class actions

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<sup>23</sup> Cappelletti et al., *supra* note 2, at 222.

<sup>24</sup> See Vivek Maru, *Access to Justice and Legal Empowerment: A Review of World Bank Practice*, 2 HAGUE J. ON RULE L. 259, 260–61 (2010) (reviewing World Bank justice access reform efforts). *But see* Carlos A. Lista, *Prólogo*, in *EL ACCESO A LA JUSTICIA*, *supra* note 1, at 13 (criticizing view of justice reform tied to economic goals like efficiency).

<sup>25</sup> See Cappelletti, Garth & Trocker, *supra* note 2, at 222. Such proposals are a constant refrain of Rhode’s. See Rhode, *A Roadmap for Reform*, *supra* note 2, at 1228.

<sup>26</sup> As I have indicated, this is a principal criticism I have of Rhode’s work. See *supra* note 9 and accompanying text; see also *supra* note 14; Daniel Bonilla Maldonado, *Extralegal Property, Legal Monism, and Pluralism*, 40 U. MIAMI INTER-AM. L. REV. 213 (2009) (arguing against excessive dependence on legal monism in property rights situations); Ruth S. Meinzen-Dick & Rajendra Pradha, *Implications of Legal Pluralism for Natural Resource Management*, 32 IDS BULLETIN 10 (2001) (arguing for the importance of pluralist and other non-individualist property regimes in natural resource management).

in the United States, for example.<sup>27</sup>

Indeed, even in the mid-1980s, Cappelletti noted the growing importance of non-individual claims for what we now know as “collective and diffuse interests”—that is, claims like clean air, for example, that affect a group or groups (identifiable *collective* interests) or a wide variety of unconnected persons or interests (a *diffuse* and not concentrated interest).<sup>28</sup> These types of claims, of course, have only grown in importance since then, given exponential rates of urbanization and associated environmental harm to groups within urban areas.<sup>29</sup> In theoretical terms, however, what links the efforts of legal theorists like Rhode and Cappelletti is that they share a commitment to strengthening legal institutions and structures to provide a range of traditional legal services, primarily from trained legal professionals.

Accordingly, the method that is chosen to realize the theory and achieve the goal varies but tends to concentrate on three measures: increasing state financial support for no-cost legal services, requiring that lawyers fulfill expanded pro bono legal service requirements, and expanding legal services through institutions like law schools.<sup>30</sup> Some proponents of this theory seek to achieve other, more novel measures. Rhode herself, although long focused primarily on enhancing and expanding formal legal services for those with fewer financial and social resources,<sup>31</sup> has more recently supported models that would improve the quality of non-lawyer delivered services, such as pro se representation training.<sup>32</sup> Others go much further, finding that access to justice

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<sup>27</sup> Cappelletti, Garth & Trocker, *supra* note 2, at 230.

<sup>28</sup> See generally Cappelletti, *Governmental and Private Advocates*, *supra* note 11; see also Cappelletti et al., *supra* note 2, at 236–41 (on importance of attending to diffuse interest claims); Garth & Cappelletti, *Access to Justice: The Newest Wave*, *supra* note 2, at 195 (citing that research showing that diffuse interests are not always best supported by government—and urban and environmental are most often of this type). See also *id.* at 209–22 for a discussion of the development of the defense of these interests.

<sup>29</sup> See UNITED NATIONS DEV. PROGRAMME, SUSTAINABLE URBANIZATION STRATEGY 4–8 (2016) [hereinafter UNDP STRATEGY] (on environmental and related harms associated with unplanned urbanization); UNITED NATIONS DEP'T OF SOC. & ECON. AFFAIRS, WORLD URBANIZATION PROSPECTS: THE 2014 REVISION 21–31 (2014).

<sup>30</sup> See, e.g., Rhode, *In the Interests of Justice*, *supra* note 2, at 96–102.

<sup>31</sup> See *id.* at 103–04.

<sup>32</sup> See Rhode, *A Roadmap for Reform*, *supra* note 2, at 1242; see generally Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed Counsel, Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012).

requires delivering a full range of legal services to enable people to conduct their daily activities, from basic counseling and commercial advice to transactional planning and advice.<sup>33</sup>

Putting this top-down, law-centered theory of access to justice to work is not, however, without its complications. Rhode herself, in some of her more recent work, acknowledges challenges in several areas, including financial, structural, and doctrinal concerns.<sup>34</sup> The financial challenges are perhaps the most obvious. Legal education is expensive, in time and resources needed to train legal professionals. Those who advocate this model for improving access to justice insist on the importance of formal training to provide high-quality legal services.<sup>35</sup> In this, the model can be criticized for being available only in the context of more economically developed societies like the United States or some countries in the European Union.<sup>36</sup>

For Rhode and other like theorists, structural problems are also serious, given “the absence of any coherent system for allocating assistance and matching clients with the most cost-effective service provider” and “the mismatch between supply and demand that often underlies the inequality.”<sup>37</sup> Overcoming these structural problems would also require much time and many resources, as well as political cooperation.

Doctrinal concerns include the resistance of courts—again, largely in economically developed countries with relatively well-

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<sup>33</sup> See, e.g. George, *supra* note 1, at 303–05 (reviewing some alternative dispute resolution options); Steven H. Hobbs, *Shout from Taller Rooftops: A Response to Deborah Rhode’s Access to Justice*, 73 *FORDHAM L. REV.* 935, 938–41 (2005) (detailing forms an expanded notion of justice access could take).

<sup>34</sup> Rhode, *A Roadmap for Reform*, *supra* note 2, at 1228–1240. Rhode also includes a fourth area of concern, namely what she calls “political” concerns. I omit discussion of them here because they are limited to the U.S. political context. See *id.* at 1238–40.

<sup>35</sup> See generally, Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 *FORDHAM L. REV.* 2761 (2014).

<sup>36</sup> In fact, Rhode herself implicitly recognizes this in some of her work, indicating that her proposals aim to present a prescription for the U.S. only. See, e.g., RHODE, *ACCESS TO JUSTICE*, *supra* note 1, at 285 (“The ideal of equal justice is deeply embedded in American legal traditions. . . . Our nation prides itself on its commitment to the rule of law.”).

<sup>37</sup> Rhode, *A Roadmap for Reform*, *supra* note 2, at 1230. Garth and Cappelletti long ago therefore argued for creative responses to this problem, such as funding more or different services, or making them accessible in different ways. Garth & Cappelletti, *Access to Justice: The Newest Wave*, *supra* note 2, at 228.

functioning, complex legal systems—to allow representation by non-lawyers and expanding standards for when a court-appointed legal counsel can be made available.<sup>38</sup> In sum, the top-down, law-centric access to justice theory suffers from being resource-intensive due to the existence of an elaborate system that requires a high degree of technical expertise to function well.<sup>39</sup> As a result, despite the best intentions of its advocates, an almost certain consequence of the model is that, in practice, it is economically and socially regressive: those with the fewest social and economic resources have the least access to some kind of justice.

This is not to say that the theory lacks appeal. At least four advantages to it can be identified. First, one can defend it on the grounds that any theory seeking to widen access to justice must, at its core, insist on the creation, defense, and elaboration of a legal system based upon the rule of law. This view is consistent with classic theories of democratic governance that stress the need for the rule of law to be maintained by its gatekeeper institutions (especially courts) to protect civil and political rights above all.<sup>40</sup> Second, this theory can also be understood to emerge from a commitment to equality, in the sense that it insists upon the ability of all persons, irrespective of resources, to obtain competent counsel as they seek justice.<sup>41</sup> Third, because the theory sets a high bar as to what constitutes legal representation and also what it means to obtain justice, the theory advances a position that can

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<sup>38</sup> Rhode, *A Roadmap for Reform*, *supra* note 2, at 1233.

<sup>39</sup> Rhode herself is aware of these challenges and offers potential solutions. *See id.* at 1242 and accompanying footnotes. In my view, however, even the solutions work only in the context of a sophisticated, elaborate legal system like that existing in the United States. One set of responses would include increased dependence on other, less traditional means of dispute resolution. Again, such proposals have been on the table for a long time. *See* Garth & Cappelletti, *Access to Justice: The Newest Wave*, *supra* note 2, at 223.

<sup>40</sup> *See, e.g.*, Roberto Gargarella, *Theories of Democracy, the Judiciary and Social Rights*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?* 13 (Roberto Gargarella, Pilar Domingo & Theunis Roux eds., 2006). *But see* Garth and Cappelletti, who, writing in 1978, offered a spirited defense of the need to serve the individual needs of all systems through robust, traditional legal institutions, but in flexible, efficient, low-cost ways. Garth & Cappelletti, *supra* note 2, at 240–41.

<sup>41</sup> *See* Nicholson, *supra* note 35, at 2777 (“Access to justice, if it is to have any true meaning, must mean access to equal legal services.”) *But see* Garth and Cappelletti, who argued for changing the normative expectation of what constitutes acceptable lawyer practice—not of course, to promote malpractice, but to change the nature of the obligation, accounting for different kinds of cases and circumstances. Garth & Cappelletti, *supra* note 2 at 238–77.

yield measurable results.<sup>42</sup> In principle, measurability would promote efficiency, since flaws are more evident. Fourth and finally, advocates of this theory argue that putting into place a system that contains a version of the rule of law that insists upon access to justice as a key feature establishes the necessary circumstances for securing other rights, such as social and economic rights.<sup>43</sup>

Conversely, at least five principal criticisms of the law-centric top-down access to justice theory can be identified. First, the resource-intensive requirements of the theory make it impractical for large-scale application. In many parts of the world, well over half of the population lives in poverty.<sup>44</sup> In such circumstances, the first national priority is unlikely to be expanded legal representation. Moreover, even where available, vindication of legal claims may not be a popular priority. In some poorer countries, evidence suggests that courts are not overburdened even when most litigation involves small matters that are not especially costly to resolve.<sup>45</sup> This suggests that, when resources are scarce, accessing and achieving justice may not be a top priority. Second, and a related point, is that the expense of this theory is limited in application to societies that have the benefit of operating some sort of “welfare state economics” inasmuch as without state support, some portion of the population will never be able to afford the expense, both financial and in time and effort, required to seek judicial resolution of a dispute.<sup>46</sup>

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<sup>42</sup> However, measuring success can be challenging depending on what criteria are used. See *Access to Justice Study Group*, *supra* note 17, at 13–19.

<sup>43</sup> See Cappelletti et al., *supra* note 2, at 225 (citing Austin Sarat’s criticisms of legal representation theories that do not undertake to effect wide and deep social transformation).

<sup>44</sup> See UNITED NATIONS POPULATION FUND, UNFPA STATE OF WORLD POPULATION: UNLEASHING THE POTENTIAL OF URBAN GROWTH 15–16 (2007).

<sup>45</sup> See, e.g., Linn Hammergren, *Expanding the Rule of Law: Judicial Reform in Latin America*, 4 WASH. U. GLOBAL STUD. L. REV. 601, 606 (2005) (“Let me just talk about a couple of original and revised assumptions based on what we have learned over the past twenty years about judicial performance. First, there is the assumption that Latin American courts are overloaded with work. You will find no end of proposals for reform, but when we actually look at caseloads, we find out that most trial courts do not receive unmanageable numbers of filings. Some of the case loads are surprisingly low; in some countries at least half the judges get only two or three hundred filings a year, and these are not complex cases. Because the average case in Latin America, as it is elsewhere, is usually debt collection or some fairly simple family dispute, not extensive litigation.”).

<sup>46</sup> This weakness of the model was recognized as far back as the 1970s. See, e.g., Cappelletti et al., *supra* note 2, at 226–27; Garth & Cappelletti, *Access to*

Third, and a response to the arguable benefit of producing measurable results, the theory operates on the assumption that results equal fairness. But that assumption remains to be proven,<sup>47</sup> results instead may speak primarily to efficiency. Fourth, and consistent with the prior concern, some critics of this theory express concern that the focus on laws and legal institutions risks favoring those who already have power.<sup>48</sup> This worry centers around what Marc Galanter has called “relative party capability,” meaning the relative ability of some to access social and economic resources which are unavailable to others.<sup>49</sup> And while, as noted above, Rhode and other defenders of this theoretical position try to grapple with these concerns by stressing need for “structural” reforms, that may be easier said than done.<sup>50</sup>

Fifth, what has been described by critics as the “excessive legalism” of this theoretical position may not be either the most efficient or most effective way to secure rights.<sup>51</sup> In sum, the law-focused, top-down approach may simply be unrealistic for many realities. As Golub has observed:

Today’s heavy emphasis on judges, lawyers and courts is analogous to what the public health field would look like if it mainly focused on urban hospitals and the doctors staffing them, and largely ignored nurses, other health workers, maternal and public education, other preventive approaches, rural and community health issues, building community capacities, and nonmedical strategies (such as improving sanitation and water supply).<sup>52</sup>

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*Justice: The Newest Wave*, *supra* note 2, at 188–89.

<sup>47</sup> See *Access to Justice Study Group*, *supra* note 17, at 8–9.

<sup>48</sup> See, e.g., Cappelletti et al., *supra* note 2, at 223. As they note, this was a concern Max Weber had in the early 20th century. See *id.* at 258.

<sup>49</sup> Marc Galanter, *Afterward: Explaining Litigation*, 9 L. & SOC. REV. 347, 360 (1975) (discussed by Garth & Cappelletti, *Access to Justice: The Newest Wave*, *supra* note 2, at 190–93).

<sup>50</sup> Garth & Cappelletti, *Access to Justice: The Newest Wave*, *supra* note 2, at 190–92.

<sup>51</sup> Cappelletti et al., *supra* note 2, at 226. A powerful and more general critique of what I have called the “excessive legalism” of this approach—arguably a very uncritical legalism—may be found in FRANK UPHAM, MYTHMAKING IN THE RULE OF LAW ORTHODOXY 75–104 (Thomas Carothers ed., Carnegie Endowment for International Peace 2006).

<sup>52</sup> Stephen Golub, *A House Without a Foundation*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 106 (Thomas Carothers ed., 2006).

### B. *Law-Focused and Bottom-Up*

The “bottom-up” version of a law-focused theory of access to justice adheres to the same principles and goals as described in the “top-down” theory. It differs, however, in its method. In order to assure a well-functioning legal system, and thus guarantee that all members of a society have access to justice, this version of a law-focused theory of access to justice recommends an effort to build the system from the roots up in order to fashion a consensus on how best to construct the legal institutions that will assure access to justice for all. Thus, the bottom-up version of a law-focused theory shares with the top-down theory a belief that getting good legal service is a key to a healthy, functioning society and that providing such services will help ease social inequities, if not entirely abolish them.

This is then a view that aims to avoid some of the elitist concerns about the operation of the top-down theory examined in the previous section.<sup>53</sup> This is accomplished, in large part, because the law-focused, bottom-up theorists focus not only on questions regarding the supply-side of access to justice (such as qualitative questions of whether there are enough judges and lawyers and whether they are sufficiently well-trained, for example) but also on the demand-side, by measuring with precision the needs of those who believe their rights have been violated.<sup>54</sup> Thus, methodologically, at their best, the law-focused, bottom-up theorists seek to use a mixed-methods approach, one that is both qualitative and quantitative.

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<sup>53</sup> To be sure, the law-focused, top-down justice access thinkers discussed above do not perceive themselves as promoting an elitist vision. Indeed, the access to justice theorists focus on changing the circumstances of the poor. *See, e.g.,* Rhode, *A Roadmap for Reform*, *supra* note 2. The key distinction here is that for what I have labelled the law-focused, top-down justice access theorists, the poor and socially excluded are not central actors in the design of the services they are to receive. Thus, the “bottom-up” reformers conceive of themselves as being engaged in a quite different project, both ideologically and methodologically. *See* Maurits Barendrecht, *Rule of Law, Measuring and Accountability: Problems to Be Solved Bottom Up*, 3 HAGUE J. ON RULE L. 281 (2011); Benjamin van Rooij, *Bringing Justice to the Poor, Bottom-up Legal Development Cooperation*, 4 HAGUE J. ON R. LAW 286–318 (2012). In fact, neither Barendrecht nor van Rooij tend to give much attention to the very U.S.-focused theorists like Rhode. Indeed, the only reference I have seen in their work is negative. *See* Barendrecht, *supra*, at 300 n.35 (“The most cited book on access to justice does not contain a clear definition of the concept.”) (internal citation omitted).

<sup>54</sup> *See Access to Justice Study Group*, *supra* note 17, at 19–20; *see also* van Rooij, *supra* note 53.



Given this commitment to understanding both sides of the supply and demand relationship, some bottom-up, law-focused theorists have argued for an expanded definition of what constitutes “legal services” by including the work of paralegals, who have less formal training and who provide services at lower rates.<sup>55</sup> Other reforms from this camp include proposals for the use of pre-paid legal service plans that function much like insurance, able to offer lower cost services by spreading the costs across a subscriber pool whose members do not uniformly require legal representation to vindicate rights.<sup>56</sup>

In addition to the advantages of the top-down theory noted above, this version of a law-focused access to justice theory has the advantage of allowing involvement of those most traditionally excluded from such decisions.<sup>57</sup> In the process, such an approach could also further the integration of other social and economic rights— what used to be called “third generation” rights.<sup>58</sup>

Importantly, some proponents of this position have taken a grounded approach that seeks to identify empirical metrics that would help shape this position, rendering it more than a platitude.<sup>59</sup> The task for these theorists is straightforward. In their own words,

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<sup>55</sup> See, e.g., Lars Waldorf, *Introduction: Legal Empowerment in Transitions*, 19 INT'L J. HUM. RTS. 229, 231 (2015) (describing international examples of community-based paralegals and the reasons some defend the practice). *But see* Colleen F. Shanahan et al., *Can a Little Representation Be a Dangerous Thing?* 67 HASTINGS L.J. 1367 (2016) (arguing that a move towards greater dependence on paralegal professionals will result in reduced law reform efforts by those capable of asserting the rights of low- and middle-income persons).

<sup>56</sup> Cappelletti and Garth, to cite one example, discussed both the possible increased use of paralegals and pre-paid legal services a generation ago, and even noted some concerns. Alternatives that looked promising may be less than hoped. See Garth & Cappelletti, *Access to Justice: The Newest Wave*, *supra* note 2, at 277–86. See e.g., Jeremy Bryant Tomes, Note, *The Emergence of Group and Prepaid Legal Services: Embracing a New Reality*, 16 TRANSACTIONS: TENN. J. BUS. L. 25 (2014) (documenting the growth of these services in the U.S.).

<sup>57</sup> See, e.g., Carlos A. Lista, *Prólogo*, in EL ACCESO A LA JUSTICIA, *supra* note 1, at 15.

<sup>58</sup> See, e.g., Louis B. Sohn, *The New International Law: The Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 38 (1982). And at about the same time, Cappelletti and Garth identified what they called the “third wave” of legal reform for justice access— ideas that, they maintained, in part served to permit defense of these “newer” rights. See Garth & Cappelletti, *Access to Justice: The Newest Wave*, *supra* note 2, at 222–27.

<sup>59</sup> See Martin Gramatikov et al., *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology*, 3 HAGUE J. ON RULE L., 349, 350 (2011) (asking how we can “make access to justice a quantifiable concept instead of a broad aspiration?”).

“[o]ur approach is simple. Access to justice implies a (natural) person who accesses some sort of procedure in order to solve a conflict. This procedure is costly. What do these costs add up to? And does the procedure ultimately lead to justice?”<sup>60</sup> Importantly, for this group of theorists, the measurement needs to be more than economic. Their aim is to develop “the possibilities of a framework in which the costs and quality of access to justice can be determined and where costs are not merely measured in terms of money, but also in terms of time and emotional costs (e.g. stress).”<sup>61</sup>

This is not a trivial move. First, it reflects the theorists’ integration of social scientific work from different disciplines (economics, sociology, and psychology, among others) done in recent decades aiming to measure access to justice from different disciplinary perspectives.<sup>62</sup> Second, the search for a nuanced set of access to justice measures also represents an explicit rejection of purely economic metrics, which aim, for example, to measure how much money is spent to resolve a claim (on the part of all of the actors involved, both individually and institutionally) and how much is recovered in the process.<sup>63</sup> These theorists seek to apply a “demand-oriented” or “user-based” perspective instead.<sup>64</sup> A consequence of this user-based emphasis of the law-focused, bottom-up theorists is to acknowledge the economic and social

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<sup>60</sup> *Access to Justice Study Group*, *supra* note 17, at 3; *See e.g.*, Maggi Carfield, Note, *Enhancing Poor People’s Capabilities Through the Rule of Law: Creating an Access to Justice Index*, 83 WASH. U. L.Q. 339 (2005) (advocating a justice access metric based on Amartya Sen’s capabilities approach, but not specifying criteria for such a metric). Other metrics embrace access to justice as part of a rule of law focus, as for example the efforts of the World Justice Project, a U.S.-based non-profit that began as an initiative of the American Bar Association but is now independent of it. *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2016 12 (2016) (defining three different justice factors as components of nine factors for rule of law), [https://worldjusticeproject.org/sites/default/files/documents/RoLI\\_Final-Digital\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf). Van Rooij usefully provides a comprehensive survey of both different rule of law and different justice access initiatives. *See* van Rooij, *supra* note 53, at 288–99; *see also* Gramatikov, *supra* note 59, at 350.

<sup>61</sup> *Access to Justice Study Group*, *supra* note 17, at 5.

<sup>62</sup> *See id.* at 3–5.

<sup>63</sup> *See, e.g., id.* at 15 (“Or, the lack of quality of the outcome can be seen as a cost. In law and economics literature, paths are sometimes evaluated in a framework that aims at minimizing the sum of decision and error costs.”) (citing C.R. Sunstein, *Two Conceptions of Procedural Fairness*, 73 SOCIAL FAIRNESS 619 (2006)).

<sup>64</sup> *See, e.g.*, Gramatikov, *supra* note 59, at 351–52.

imbalances that may prevent lower- and middle-income people from receiving access to justice equivalent to that available to those with more resources. If someone is not entitled to time off from work to attend a court hearing, for example, she is in a very different place than a corporate executive with greater flexibility and less accountability for her time. This is not to suggest that these theorists have an ideological agenda, or at least not explicitly. On the contrary, their work does not advocate openly for a distributive justice goal.<sup>65</sup> However, since as noted above, most justice is inequitably resourced,<sup>66</sup> a focus on users and their needs almost certainly will demand a review of inequities and solutions to address them.

To be sure, the choice of an appropriate metric, as these theorists recognize, is much more complicated than might seem to be the case at first glance. For example, they ask, should one measure the “psychological costs” of deciding to bring an action?<sup>67</sup> Answering that question in turn requires determining how to measure those costs and then evaluating what type of action to bring. As these theorists further recognize, it may also be essential to consider not just the costs—financial, temporal, and psychological—of an effort to access justice, but also to measure the “quality” of the outcome.<sup>68</sup>

The following example demonstrates how cost consideration does not adequately consider individual justice desires. Suppose I am robbed and my robber is identified, but has no resources with which to compensate me for the robbed goods. If bringing an action can nonetheless result in a criminal conviction, I might be satisfied with the result. “Justice” has been done. But I might not be: I might yearn to be made whole and for my goods to be returned.<sup>69</sup> By emphasizing quality consideration in their metric,

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<sup>65</sup> However, it bears noting that in a more recent work associated with this position, the areas of focus for measurement on justice access as the “most frequent and pressing legal needs” are those that characterize the lives of the world’s poor majority, from subsistence and lack of basic necessities to property and personal insecurity. *See id.* at 356–57.

<sup>66</sup> *See supra* note 13 and accompanying text.

<sup>67</sup> *Access to Justice Study Group, supra* note 17, at 8.

<sup>68</sup> *See, e.g., id.* at 9.

<sup>69</sup> As the *Access to Justice Study Group* notes: “[t]hree decades of socio-legal research have demonstrated that citizens also care deeply about the process by which conflicts are resolved and decisions are made, even when outcomes are unfavorable or the process they desire is slow or costly. So not only time and money are important, things like lack of bias, thoroughness, clarity, voice (the

the law-focused, bottom-up theorists aim to address such considerations. In this and other ways,<sup>70</sup> these theorists aim to produce a metric that is three-dimensional in the sense that it seeks to measure the complications and multiple variables that constitute what we mean by the phrase “access to justice.”

For many of the law-focused, bottom-up theorists, the aim is comparative. This approach seeks to provide a means to identify best practices across countries, so as to be useful to the widest possible range of people, while at the same time recognizing the need to be sensitive to local and cultural differences.<sup>71</sup> Since the first articulation of these ideas in the early 2000s, these law-focused, bottom-up theorists have worked to refine and explain their methodology.<sup>72</sup> In addition, they have engaged in empirical projects to test their methodology, in both more and less economically developed countries.<sup>73</sup> While the theorists continue to seek more empirical support to improve the approach, this methodical articulation and testing of theory presents a promise for

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ability to tell one’s story) and a dignified, respectful treatment are at least as important.” *Access to Justice Study Group*, *supra* note 17, at 16.

<sup>70</sup> *See generally id.* For example, they explore the challenges of measuring the implication of different kinds of error, ranging from errors because of corruption to more mundane, less deliberate errors. *See id.* at 15 (“However, measuring an error assumes that we can objectively distinguish a ‘right’ outcome from an ‘erroneous’ outcome and that we also have an objective idea of the magnitude of that error. A way to approach this is to consider ‘the legally sound decision a fully informed and objective court would reach’ as the point of reference. In theory, this works for errors arising from corruption, or for settlements that are biased. It does not work, however, for ‘regular’ day-to-day errors that occur in deciding cases. Neither does it work for informal paths such as mediation, where different needs or concerns can be met, which may be neglected in court proceedings. A more qualitative criterion, like some reference to the manner in which the expected outcome will reflect the legitimate needs and concerns of the complainant, might be preferable. But how can this be established objectively?”).

<sup>71</sup> *See id.* at 20 (“In order to be used for comparative purposes, however, the measurement tools will have to be sufficiently independent in relation to legal culture, local preferences, and local resources. This may be hard to achieve. The value of money, of time, and of ‘a day in court’ may vary across countries.”).

<sup>72</sup> *See generally*, Gramatikov, *supra* note 59; Maurits Barendrecht, *Rule of Law, Measuring and Accountability: Problems to be Solved Bottom Up*, 3 HAGUE J. ON RULE L. 281 (2011); MARTIN GRAMATIKOV ET AL., A HANDBOOK FOR MEASURING THE COSTS AND QUALITY OF ACCESS TO JUSTICE (Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Sys. ed., 2009).

<sup>73</sup> *See* Gramatikov, *supra* note 59, at 351 n.8 (“Pilot studies have been conducted in the Netherlands, Bolivia, Bulgaria, Thailand, Poland, Australia, Cameroon, Senegal, Afghanistan, Canada and other countries.”).

wide-scale application.

As the law-focused, bottom-up theorists recognize, their proposals will be most effective going forward if proponents work to prioritize the type of justice provided. For instance, an advocate may ask whether more attention should be given to property offenses or family disputes. This is, however, challenging to determine, and a cause of concern for the intellectual leaders of this position.<sup>74</sup> A continuing challenge, moreover, will be to expand the metric to evaluate the utility and effectiveness of different methods of dispute resolution, including informal techniques, for all stakeholders.<sup>75</sup>

There are other challenges as well. One might ask, for example, why this theory focuses on building solid court systems when there are more urgent needs for, say, health care, education, or employment. The bottom-up version of the law-focused theory of access to justice opens itself to the criticism that it distracts from the real problems for populations most in need. In addition, the theory's version of "excessive legalism" does not protect those who are traditionally excluded from the legal system from others with greater experience and more resources using these strong institutions to delay and to harm the interests of those excluded.<sup>76</sup> This is a problem, however, that no theory may be able fully to control. What is promising about the law-focused, bottom-up theory—and in particular, with those theorists committed to articulating and testing a reliable, comprehensive metric focused on determining quality—is that it could be transformational for many because of its ability to take individualized, grassroots needs into account.

### C. *Integrated and Requiring Law*

A more recent addition to the theoretical literature on access to justice advances the third position considered here, labelled here

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<sup>74</sup> See generally Maurits Barendrecht et al., *Priorities for the Justice System: Responding to the Most Urgent Legal Problems of Individuals* (TISCO Working Paper No. 001/2008,2008), <http://ssrn.com/abstract=1090885> (last visited June 13, 2017).

<sup>75</sup> See, e.g., Garth & Cappelletti, *Access to Justice: The Newest Wave*, *supra* note 2, at 232–38 (exploring the utility of emerging methods to resolve disputes to the satisfaction of those involved).

<sup>76</sup> Such as, for example, the recognized benefits of "repeat players" over "one-shotters." See *Access to Justice Study Group*, *supra* note 17, at 4 (citing work by Marc Galanter).

as “integrated and requiring law.” This theoretical position, like the two described above, is also centered around a commitment to the rule of law as an essential—and sometimes *the* essential—requirement for achieving a more just and equal society.<sup>77</sup> However, it departs from the aforementioned theories in two important respects. First, the position articulates a robust definition of the elements that constitute the rule of law, which, unlike the approaches outlined above, is not limited to traditional legal institutions and actors only. Second, and relatedly, this theoretical position offers a much wider, more practical reach than the previous two, allowing other aspects of human experience outside of legal institutions and actors to serve the goal of access to justice. As such, the position does not maintain that legal reform for access to justice is an end in itself. Rather, this position views legal reform, including access to justice, as a means to the end of providing a better life for all.

The principle that undergirds this position differs from the previous two in another key respect: it is explicitly multi-disciplinary. For this reason, I have labelled it an “integrated” theoretical position. Thus, law is but one element in the spectrum of tools that may be used to make justice available, and this element’s importance and value will change depending on the situation. Under this position, law is a mechanism used to provide a wide variety of services and to satisfy many needs; its effective use for the poor and those most in need of legal services must be informed by the social sciences. In this, of course, the legal empowerment approach shares much with the law-focused, bottom-up theorists who, as they note, drew upon decades of social science research.<sup>78</sup> And indeed, in broad terms, legal empowerment shares many of the grassroots goals of the law-focused, bottom-up theorists. The difference between the two is definitional, defining “justice” that is being accessed differently, as well as strategic.<sup>79</sup>

This position closely identifies with the legal empowerment movement and with the deliberations of the Commission for the Legal Empowerment of the Poor (CLEP), an independent global commission consisting of representatives from diverse nations which was established in 2005. While CLEP will be discussed at

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<sup>77</sup> See e.g., CLEP Report v. 1, *supra* note 3, at 15, 27.

<sup>78</sup> See, *supra* note 53.

<sup>79</sup> See Barendrecht & de Langen, *supra* note 3, at 269.

length in what follows as an illustration of the theory, it is important to remember that this position embraces more than just CLEP's efforts and deliberations.<sup>80</sup>

The goal of the legal empowerment position, in contrast to that of the two theoretical positions already discussed, is not merely to provide the architecture necessary to deliver formal legal services, but to use law and other tools—economic and sociological analysis, for example—to achieve a more equitable society. In the words of a CLEP report, the aim is to create “an infrastructure of laws, rights, enforcement, and adjudication.” For CLEP and adherents of this project, this “is not an academic project, of interest to political scientists and social engineers. The establishment of such institutions can spell the difference between vulnerability and security, desperation and dignity, for hundreds of millions of our fellow human beings.”<sup>81</sup> Thus, legal empowerment involves a commitment to development, broadly construed. In the process, legal empowerment theorists explicitly seek to blur the lines between professional roles. Lawyers must conceive of themselves more broadly as sociologists, social workers, and community service providers, while social science professionals, conversely, must begin to conceive of themselves as legal agents.<sup>82</sup> Under this theoretical position, all social actors need to commit themselves to changing the lives of the world's poor majority

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<sup>80</sup> To be sure, there are differences of opinion between legal empowerment thinkers generally and the CLEP Report. For instance, a leading legal empowerment theorist, Stephen Golub, has been critical of CLEP. *See* Stephen Golub, *The Commission on Legal Empowerment of the Poor: One Big Step Forward and a Few Steps Back for Development Policy and Practice*, 1 HAGUE J. ON RULE L. 101 (2009); *see also* Stephen Golub, *The Legal Empowerment Alternative*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 161–82 (Thomas Carothers, ed. 2006).

<sup>81</sup> CLEP Report v. 1, *supra* note 3, at preface; *see also* Barendrecht & de Langen, *supra* note 3, at 268–69; THE WORLD BANK, *THE WORLD BANK LEGAL REVIEW*, v. 4: LEGAL INNOVATION AND EMPOWERMENT FOR DEVELOPMENT 34–35 (Hassane Cissé et al., eds., 2013).

<sup>82</sup> As one prominent adherent of this view has written: “The upshot for [rule of law, or] ROL development practitioners is that they need to think less like lawyers and more like agents of social change. Conversely, development practitioners in other fields could benefit from thinking a bit more like lawyers and human rights advocates. These dual changes in perspective will open up vistas for using law to make a greater contribution to development, breaching the programmatic isolation represented by ROL orthodoxy.” Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative 3* (Carnegie Endowment for International Peace, Working Paper No. 41, 2003) [hereinafter Golub, *Beyond Rule of Law Orthodoxy*].

through legal empowerment.

To be sure, what exactly “legal empowerment” means can be confounding. For advocates of this position, “empowerment” is about securing a wide menu of rights—political, civil, social, and economic—such that “out of familiar and established principles, comes a radical agenda of legal empowerment, not a technical fix, but an agenda for fundamental reform.”<sup>83</sup> It is the effort for “fundamental reform” that rejects expensive, top-down approaches like the top-down, law-focused approach examined above. Instead, “[t]he concept . . . brings together a range of alternative approaches to promoting access to justice that have been developed largely in response to discontent with rule-of-law and law-and-development approaches.”<sup>84</sup> The method is to promote “the use of legal services and [other] related development activities to increase disadvantaged populations’ control over their lives.”<sup>85</sup>

Early proponents of this view articulated a broad and aggressive reform agenda.<sup>86</sup> In particular, the agenda focused on reform of property, labor, and business enterprise rights and rules.<sup>87</sup> CLEP’s deliberations focused specifically on using legal reforms to reduce poverty. Access to justice therefore involves using law to craft an economic strategy with three elements: “1) adopting a legal perspective on the economy at the micro-level[,] 2) adopting an economic perspective to supplying law at the micro level[, and] 3) taking a realistic approach to the law and the economy.”<sup>88</sup> What is key here is the rejection of a belief that justice is accessed exclusively via legal institutions. Instead, this position maintains that access to justice can occur at local, “micro” levels. The justice to be accessed in this conception can mean, for

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<sup>83</sup> CLEP Report v. 1, *supra* note 3, at 20.

<sup>84</sup> Barendrecht & de Langen, *supra* note 3, at 261–62.

<sup>85</sup> *Id.* at 262 (quoting Golub, *Beyond Rule of Law Orthodoxy*, *supra* note 82, at 25).

<sup>86</sup> Stephen Golub, for example, while rejecting what has been described as the “state-centric, justice-sector-focused, and lawyer-dominated, rule-of-law orthodoxy” argued for implementing measures that would 1) strengthen the capacities and power of the disadvantaged, 2) select issues of importance to them (and with them), 3) focus on broader social, legal, and administrative factors affecting their lives and not just justice sector activities, 4) support civil society and 5) work in a context-sensitive manner to respect and support local ideas and initiatives. *Id.* Carfield discusses the indebtedness of this position to development theories such as the capabilities approach associated with thinkers like Amartya Sen and Martha Nussbaum. *See* Carfield, *supra* note 60, at 357–58.

<sup>87</sup> *See* Barendrecht & de Langen, *supra* note 3, at 251.

<sup>88</sup> *See id.* at 263.



example, working under a set of predictable rules in interactions with a landlord so that you and your family can live secure in the knowledge that you will not be displaced, or getting a license to practice your trade with no difficulty and at an affordable price.

In addition, this position dramatically shifts the roles of formal legal actors and institutions. Specifically:

Legal empowerment differs from ROL orthodoxy in at least four additional ways: (1) attorneys support the poor as partners, instead of dominating them as proprietors of expertise; (2) the disadvantaged play a role in setting priorities, rather than government officials and donor personnel dictating the agenda; (3) addressing these priorities frequently involves nonjudicial strategies that transcend narrow notions of legal systems, justice sectors, and institution building; (4) even more broadly, the use of law is often just part of integrated strategies that include other development activities.<sup>89</sup>

In this way, the advocates of legal empowerment theory advance the view that “[l]egal empowerment both advances and transcends the rule of law.”<sup>90</sup> With its broad-based, participatory, grassroots approach, the legal empowerment theory aims to change the circumstances of millions, if not billions, of people by using law as an equitable means for achieving the end of greater political, social, economic, and legal equality. Perhaps unsurprisingly, the approach remains a work in progress, as its advocates seek to build a model that can be copied and applied in different circumstances.<sup>91</sup>

One formulation of the role of law in the construction of this theory cites the need for four basic elements to provide justice:

A setting in which a dispute or a need for protection can be discussed and solutions can be negotiated; [p]rinciples, rules, criteria or schedules that guide the outcomes of discussion; [a] (neutral) person who can decide on outcomes, particularly if the disputants are not able to settle their differences; [s]ufficient incentives for the disputants to live up to the outcome that is reached through settlement or neutral decision.<sup>92</sup>

Simply put, the legal empowerment movement seeks to shape social structures that mimic many of the principles and aims of judicial and legal systems (resolution forums, agreed rules, impartial decision makers, and respect for impartially determined

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<sup>89</sup> Golub, *Beyond Rule of Law Orthodoxy*, *supra* note 82, at 6.

<sup>90</sup> *Id.* at 9.

<sup>91</sup> See THE WORLD BANK, *supra* note 81, at 40–45.

<sup>92</sup> Barendrecht & de Langen, *supra* note 3, at 265.

results). But it seeks to do so without insisting upon an elaborate institutional architecture of a given design with specified values that a law-centric, top-down theory requires with, *inter alia*, its insistence on expensive professional training and elaborate substantive and procedural requirements. In other words, this is a theory that aims to mimic the values of social (or community) consensus and order that legal and judicial systems require without the resource-intensive features of such systems, but with the added likelihood that those features also support differences of social, political, and economic power.

Even in its relatively young formulation, the legal empowerment theory has much to recommend if the goal of an access to justice theory is to expand the range of people and matters for which justice can be accessed. At least six benefits of this theoretical position can be identified.

First, the theory serves to consolidate social and political consensus, recognizing the value in solidifying, defending, and articulating local norms and experience. Even those who defend the law-centric, top-down access to justice theory described above have long recognized the importance of legal activities on a local level: “[A] large number of thoughtful proponents of conciliation in both Europe and North America argue for the necessity of decentralized, independent, voluntary institutions capable of building local unity at the same time they resolve disputes through conciliation.”<sup>93</sup> Second, and relatedly, the legal empowerment theory seeks to not only spur consolidation of social and political norms but also to advance economic development in the process.<sup>94</sup>

Third, the changing character of democratic governance globally suggests that this is a propitious moment to try and introduce such efforts. The paradigm for democratic governance has, as Gargarella and others have noted, been expanding worldwide in recent decades, resulting in a call for increased defense of social rights.<sup>95</sup> Since the social rights that need be protected can vary depending on location, a more localized approach—as advocated by legal empowerment theory—may have widespread appeal. Fourth, and relatedly, in light of the expanded paradigm for democratic governance, there now exist across the world constituencies who favor the transformative power of law to

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<sup>93</sup> Cappelletti et al., *supra* note 2, at 249.

<sup>94</sup> See Golub, *Beyond Rule of Law Orthodoxy*, *supra* note 82, at 37–38.

<sup>95</sup> See generally Gargarella, *supra* note 40.

protect rights.<sup>96</sup> Importantly, these constituencies do not always insist on top-down approaches, but often prefer more localized approaches.<sup>97</sup>

Fifth, in a world of staggering inequality in social, economic, and political power, the legal empowerment approach seeks equitable redistribution of all of those resources.<sup>98</sup> This is a point that once again reflects the overlap between the theoretical positions described here; even those who advocate law-centered, top-down access to justice theories recognize the fundamental importance of this goal.<sup>99</sup>

Sixth, and finally, the legal empowerment theory has the advantage of being realistic. It does not create aspirational models that only the richest or best-ordered societies can achieve. Instead, the legal empowerment theory recognizes that using law as a mechanism to promote transformative social, political, and economic change is a time-intensive, long-term project. For the legal empowerment theorists, in short, one size does not fit all situations.<sup>100</sup>

However, the successful realization of the legal empowerment theory for access to justice is not without challenges. Indeed, one can identify as many areas of concern as benefits of the theory. The following discussion identifies nine different ways in which the further refinement of the theory will require dedication and

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<sup>96</sup> See Javier A. Couso, *The Challenging Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?* 68–71 (Roberto Gargarella et al., eds., 2006).

<sup>97</sup> See, e.g., Bina Agarwal, *Toward Participatory Inclusion: A Gender Analysis of Community Forestry in South Asia*, in *THE STATE OF ACCESS: SUCCESS AND FAILURE OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES* 37–38 (Jorrit de Jong and Gowher Rizvi, eds., 2008) (on challenges of achieving widespread inclusion even when there has been devolution of power at local level); Lista, in *EL ACCESO A LA JUSTICIA*, *supra* note 1, at 15 (describing one view of justice access as focusing on context and substantive circumstances).

<sup>98</sup> See CLEP Report v. 1, *supra* note 3, at 68, 80–81.

<sup>99</sup> See Cappelletti et al., *supra* note 2, at 248.

<sup>100</sup> See Barendrecht & de Langen, *supra* note 3, at 266–67 (noting that the legal empowerment approach, in contrast to many other law and development practices, “focuses on the economy as it really is, not as models describe it, and on the law as it really works in practice, not as it appears on the books.”). The approach takes a realistic long-term view to transformative social change. See *id.* at 269; see also Golub, *Beyond Rule of Law Orthodoxy*, *supra* note 82, at 38 (observing that there are “many locally determined ways of undertaking” legal reforms).

effort for it to succeed.

First, classic formulations of the theory of democratic governance contemplate an established judicial and legal system in which the gatekeepers—lawyers, judges, and administrative staff—oversee the smooth functioning of the system.<sup>101</sup> To the extent that expectations can shape institutional design, the legal empowerment theory may be difficult to operationalize because it is a less formal way of resolving disputes, which could make some skeptical of its ability to secure just results on a large scale without the classic gatekeepers in place.

Second, the CLEP and other proposals advocate working at the grassroots level to develop their proposals, but in fact rely heavily on top-down techniques.<sup>102</sup> CLEP's reports can, at times, speak rather patronizingly about what the poor "need."<sup>103</sup> Furthermore, it is important to realize that the reports are written not by the poor, but by professionals committed to the CLEP approach.<sup>104</sup>

Consequently, and third, the legal empowerment theory may in the end be unable to avoid the exact outcome it criticizes. Even its proponents acknowledge the challenges of widely operationalizing the legal empowerment access to justice approach. Barendrecht and de Langen, for example, cite six barriers to achieving justice using legal empowerment instead of more traditional, formalistic models (namely "geographical, financial, and language barriers, complexity, cultural norms, and delays"). They also cite what they call two "mechanisms of exclusion:" gatekeepers opposed to the efforts and uncertainty about the law. These are massive concerns and powerful inhibitors to change in much, if not most, of the world.<sup>105</sup>

Furthermore, and fourth, legal empowerment casts the net so

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<sup>101</sup> See, e.g., Gargarella, *supra* note 40, at 13–29.

<sup>102</sup> This is to note the irony that while CLEP insists it is advocating a "bottom-up" strategy, in fact CLEP itself is constituted of people from the highest level of government, international civil society and economic institutions who lay out the steps for implementation of its agenda and for its appropriate legal role. See CLEP Report v. 1, *supra* note 3, at 76–89. Moreover, it merits highlighting van Rooij's observation that legal empowerment theory is not novel at all, but merely a reiteration of long-established ideas and trends in law and development practice. See Van Rooij, *supra* note 53, at 310–12.

<sup>103</sup> See, e.g., Commission for the Legal Empowerment of the Poor, *Making the Law Work for Everyone*, v. 2 (2008) [hereinafter CLEP Report v. 2], at 77.

<sup>104</sup> See THE WORLD BANK, *supra* note 81, at 35–40.

<sup>105</sup> See Barendrecht & de Langen, *supra* note 3, at 258.

widely as to the kinds of rights which must be provided in order to achieve justice that it may risk failure due to its lack of a defined theory about which there is a clear consensus as to what goals must be secured, and in what order. As de Langen and Barendrecht observe in a generally sympathetic assessment of the potential for legal empowerment success: “[h]owever, a promising approach does not yet constitute a feasible strategy. Translating the approach into concrete programs and getting the implementation right will be crucial. It is also difficult, because of weak incentives in a setting of conflicting interests.”<sup>106</sup> Indeed, as Linn Hammergren has written in a consideration of access to justice in the context of Latin American judicial services, there are serious concerns, not least budgetary, in assuming that more legal services will result in better justice. Hammergren writes: “When the fundamental right of access to justice becomes equated with the absolute right of court use, the public good itself may be endangered. The service providers lose all control over what is delivered and with it their ability to direct resources into the most socially productive channels.” As she further observes, once “physical, financial, operational and attitudinal barriers are removed,” new challenges will surely arise.<sup>107</sup> Hammergren’s critique of the failure to engage in priority-setting in the context of judicial services is equally true for legal empowerment’s broad and unstructured promises.

Relatedly, and fifth, at this stage it is unclear whether legal empowerment theory will be inhibited by the same concerns about crippling resource commitments that bedevil the widespread imitation of developed country legal and judicial systems. For example, legal empowerment theory, with its grassroots focus, advocates admirable measures like public “awareness raising” and more robust efforts to make useful information available to people

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<sup>106</sup> *Id.* at 269. CLEP, for its part, tends to glide over the potential for and reality of conflict, with little attention to the careful strategizing called for by those like de Langen and Barendrecht. *See, e.g.*, CLEP Report v. 1, *supra* note 3, at 40 (suggesting that better property dispute resolution mechanisms will minimize conflict, without specifying what they might be); *see generally* CLEP Report v. 2, *supra* note 102 (discussing a wide range of dispute resolution innovations, without assessing their relative merits as compared to one another or suggesting priorities).

<sup>107</sup> HAMMERGREN, *Envisioning Reform*, *supra* note 12, at 132. However, it is worth noting that some theorists—not empowerment theorists—are hopeful that courts may serve a key role to broker differing interest claims. *See, e.g.*, Couso, *supra* note 96, at 68–69.

as they seek to defend their interests.<sup>108</sup> Doing so on a widespread scale, however, takes time and money. It is fine to speak of the importance of focusing on the “demand side” of microjustice.<sup>109</sup> But that is not a cost-free proposition. People need to be educated (including having basic literacy to be able to process the information) about what their demands can be, and how to satisfy them. The legal empowerment literature is frustratingly vague on the potential costs of these efforts, and lacks detailed proposals on achieving these goals with low-cost efforts.

Moreover, and sixth, the flexibility that now characterizes a key aspect of legal empowerment theory could be its undoing. That is, flexibility can also mean a lack of definitional clarity. Leading advocates of legal empowerment theory, make statements that can seem damnably vague; for example, Stephen Golub says that sometimes we need law, and sometimes we do not.<sup>110</sup> Explanations like that make no attempt to try and determine what works and what does not. To be sure, there are those who are working to provide greater focus by, for example, developing metrics for successful examples of legal empowerment to be able to improve its effectiveness.<sup>111</sup> A valid criticism of the legal empowerment theory, therefore, is that it is unfocused, which results in a lack of clarity regarding its purpose and operation.

Seventh, and equally worrying, due to this vagueness of purpose and content, legal empowerment risks trying to be all things to all people, which may be an open invitation to abuse. Defenders of more traditional, law-centered, top-down access to justice theories worry about the consequences of untrained professionals stepping in to fill roles of the legal service branch.<sup>112</sup> With no standards to monitor service failures (the role played by professional disciplinary bodies, law faculties, and bar associations, for example), grass-roots “microjustice” providers might easily become those eager to see uninformed consumers part with their

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<sup>108</sup> See Barendrecht & de Langen, *supra* note 3, at 262 (reviewing the claims of empowerment theorists).

<sup>109</sup> See *id.* at 265.

<sup>110</sup> See Golub, *Beyond Rule of Law Orthodoxy*, *supra* note 82, at 41.

<sup>111</sup> Carfield, for example, proposes an access to justice index that would allow assessment of successful initiatives by measuring effectiveness according to a range of factors. See Carfield, *supra* note 60, at 359–60. However, successful implementation may be easier said than done. While promising efforts are underway, “access to justice is hard to measure and data . . . are scarce.” See de Barendrecht & de Langen, *supra* note 3, at 251.

<sup>112</sup> See, e.g., Nicholson, *supra* note 35.

money. That is, creating a new class of microjustice gatekeepers does not guarantee that that class will be any more committed to social equity than their well-heeled counterparts.<sup>113</sup>

Eighth, and speaking practically, it is well and good to speak of the need for “realism” in effectuating a legal empowerment strategy for access to justice that has as its central aim poverty reduction. But that may mean an extremely slow and incremental process. Theories tend to be hard to sustain as practice guides over very long periods, as they change and mutate. As a result, “legal empowerment” could become a buzz phrase that ends up being diluted from overuse and abuse.

Ninth and finally, the emphasis on law as a tool for poverty reduction relies on an untested assumption that law will make the difference. Yet this runs counter to longstanding debates in development theory and practice, which continues to struggle with the question of priorities: should a legal system be the priority? Why not health? Education? Employment? CLEP, for example, maintains that these priorities cannot be reliably provided without strong legal structures.<sup>114</sup> But there are notable examples where this is not the case—in the People’s Republic of China, for example, legal empowerment was not central to the national project, but social and economic (if not political) conditions improved dramatically for a substantial portion of the population.<sup>115</sup> In short, it remains for legal empowerment theorists to make its empirical, and not merely its rhetorical, case.

#### D. *Integrated but Not Requiring Law*

The fourth position examined here does not dismiss law by any means. But it is a theoretical position that does not necessarily require law to achieve justice, unlike those discussed above. That is, for this theoretical position, justice is achieved when resources and social and economic opportunities are distributed equitably

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<sup>113</sup> See Barendrecht & de Langen, *supra* note 3, at 268. *But see, e.g.*, Jackie Dugard & Katherine Drage, “To Whom Do People Take Their Issues?:” *The Contribution of Community-Based Paralegals to Access to Justice in South Africa* 21–22 (Justice & Dev. Working Paper Series, Paper No. 21, 2013) (finding that when paralegals were given sufficient independence, they made significant inroads in expanding legal services for the poor).

<sup>114</sup> See CLEP Report v. 1, *supra* note 3, at 25–39.

<sup>115</sup> See, *e.g.*, Thomas Carothers, *Promoting the Rule of Law Abroad—the Problem of Knowledge* 6 (Carnegie Endowment for International Peace, Working Paper No. 34, 2003).

and managed efficiently. Thus, access to justice depends upon responding in a deliberate fashion to the most pressing social and economic needs in any given situation. To be clear, I am referring here to thinkers who would not, I think, self-identify as access to justice theorists. However, my suggestion is that access to justice is a central element implied by their work. Theorists who advocate this position are those whose work has examined situations where rule systems have been put in place and disputes have been successfully resolved without recourse to, or the creation of, state-sponsored and developed legal and judicial systems.

Moreover, unlike the three justice access theories considered above, whose proponents tend to share ideological interests in equity and equality typically associated with the ideological left, that is not true with the position I am calling “integrated but not requiring law.” Indeed, this theoretical position unites thinkers across the ideological spectrum. Consider the work of conservative legal scholar Robert Ellickson, who examined the successful management of cattle range lands in northern California by ranchers without recourse to any legal system.<sup>116</sup> Similarly, a less conservative writer, the anthropologist James Acheson, studied the practices of Maine lobstermen to regulate their livelihoods without involving lawyers, tribunals, or any of the other trappings that characterize legal systems.<sup>117</sup> Perhaps best known of all in this vein is the pioneering work of the economist Elinor Ostrom, whose work on commons theory explores various circumstances in which stakeholders interested in the management of a resource over time develop means to cooperate and resolve differences without involving legal actors.<sup>118</sup> Ostrom’s work on the development of common pool resource (CPR) management institutions is a case in point, in which she demonstrated the ability of non-legal actors to develop complex rules regulating access to and use of CPRs including pastureland and water.<sup>119</sup>

In contrast to the approaches discussed previously, there are several attractive features of this theoretical position. First, these options are low cost. Acheson’s lobstermen (and they were all men), for example, resolved disputes in pairs and small groups,

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<sup>116</sup> See generally ROBERT M. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).

<sup>117</sup> See generally JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE (1988).

<sup>118</sup> See generally ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

<sup>119</sup> See *id.* at 58–88.



and even collectively. No one paid filing fees, hired lawyers, or expended excessive amounts of time in meetings to resolve problems; the lobstermen managed their fishery via non-legal self-governance.<sup>120</sup> The same was true of Ellickson's California cattle ranchers.<sup>121</sup>

Second, and of equal appeal, is the fact that these examples were less conflictual. That is, there was a high premium placed by the parties on resolving disputes to the mutual satisfaction of all, even when the dispute was very complicated.<sup>122</sup> Note that CLEP, for its part, has indicated a comparable desire to apply a resolution-oriented rather than a conflict-driven model in its legal empowerment activities.<sup>123</sup> However, this is easier said than done. The lack of disruptive conflict characterizing the activities and decisions of social actors appears to derive from the shared local interest in the use and protection of a resource. This characteristic suggests that in terms of establishing normative principles as to what constitutes justice access, the theoretical position has limited utility.

Relatedly, these examples all deal, broadly speaking, with the question of what constitutes access to justice in resource management situations. It is unclear if justice could be accessed, much less achieved, through this theory in cases where, for instance, rent disputes are at issue, pitting people of different economic and social position against one another, or in a question of pollution control and reduction that affects very different stakeholders, from those interested in good human and animal health to those who want to defend economic interests.<sup>124</sup> That is, the examples cited here may feature less conflict and more consensus, because the affected parties share a common interest

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<sup>120</sup> See generally ACHESON, *supra* note 117 (describing how the lobster gangs resolved legal questions).

<sup>121</sup> See ELLICKSON, *supra* note 116, at 167–229 (on development of norms for resource regulation).

<sup>122</sup> See *id.* at 205.

<sup>123</sup> See generally CLEP Report v. 2, *supra* note 106.

<sup>124</sup> The example of coal mining regulation is a strong one that pits environmental advocates against those who run and even work in the industry—even when those who work in the coal mining industry have their health and physical environment negatively affected by the activity, they may nonetheless support its continuance. See, e.g., Michael Barbaro, *The Climate Change Battle Through One Coal Miner's Eyes*, N.Y. TIMES: THE DAILY (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/podcasts/the-daily/scott-pruitt-coal-mining.html>.

they seek to protect.

Finally, even if normative principles of wide application could be developed for this theoretical position of access to justice, it is hard to imagine how a model that rejects a formal state role would be administered. Gatekeepers can be the source of problems, but they also keep the trains running on time—or, in this case, the dispute resolution channels moving.

## II. URBAN AND ENVIRONMENTAL RIGHTS & ACCESS TO JUSTICE

This Part will examine leading claims to urban and environmental rights. After establishing the character of such rights, the Part will explore the relevance of access to justice in the urban and environmental context.

The world does not lack for urban and environmental law and regulation. However, in some countries, and for different reasons, enforcement of and support for the rights created by these laws and regulations is lacking.<sup>125</sup> A common theme in enforcement failures stems from the complex nature of many urban and environmental rights claims. While air pollution, for example, can harm millions in the city of New Delhi (to cite a now infamous example),<sup>126</sup> it does not do so equally. Moreover, the relation of a factor such as air pollution to other factors that negatively affect health may be difficult to disentangle. Thus, the causes and effects are many, making it a challenge, at best, to apportion fault. As a result, the collective and diffuse nature of the rights demanding protection often leaves them with no recognized legal defenders.<sup>127</sup>

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<sup>125</sup> The situation in countries as different from one another as Brazil and Pakistan is typical of much of the developing world. See, e.g., *Clearer Picture Emerging Over Brazil's Mining Disaster*, DEUTSCHE WELLE (Ger.) (Jan. 27, 2016), <http://www.dw.com/en/clearer-picture-emerging-over-brazils-mining-disaster/a-19006554> (quoting a UN official maintaining, inter alia, “that regulation in Brazil’s mining sector is adequate more in theory than in practice, and that enforcement is lacking.”); Sonia Malik, *Environmental Tribunal: Only 15% of Cases Decided, 20% Fines Recovered*, EXPRESS TRIBUNE (Pak.) (June 3, 2012), <http://tribune.com.pk/story/387884/environmental-tribunal-only-15-of-cases-decided-20-of-fines-recovered/>.

<sup>126</sup> See, e.g., Ellen Barry, *Smog Chokes Delhi, Leaving Residents ‘Cowering by Our Air Purifiers’*, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/08/world/asia/india-delhi-smog.html> (citing levels of some air pollutants from diverse sources as high as 16 times the legal limit).

<sup>127</sup> But see Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT’L L. 405, 412 (2001) (recounting increase in number of actions to protect collective and diffuse interests across the world). See also, e.g., *infra* note 162 and accompanying text.

### A. *Rights Claims*

In our highly industrialized, urbanized world, in which the global population continues to grow at exponential rates,<sup>128</sup> there are reasons to worry about the quality of the places in which most people spend their lives. Indeed, there is no shortage of urban and environmental problems to tackle. And while there are, of course, localized and distinct problems, it is also possible to note problems and challenges that are much the same everywhere despite differences of geography, socioeconomic conditions, and culture. The list includes, for example: the effects of climate change, notably from sea level rise and changed weather conditions;<sup>129</sup> infrastructure challenges, particularly in the areas of housing, transport, sanitation, and the provision of potable water;<sup>130</sup> and public security. Furthermore, available evidence suggests that many governments either will not or cannot, on their own, identify and tackle the various ways in which these problems affect the lives of their populations.<sup>131</sup> The proposition advanced here is that all of us have certain rights that merit protecting by virtue of living in cities and physical environments and that these rights are often negatively affected by anthropogenic activities. What follows in this Part is, therefore, a brief review of the principal frameworks used to identify and discuss such urban and environmental rights.

### B. *Urban Growth and Urban Rights*

Globally, urban growth continues unabated. As the United Nations observed: “In 2008, the world reach[e]d an invisible but momentous milestone: For the first time in history, more than half its human population, 3.3 billion people, will be living in urban areas. By 2030, this is expected to swell to almost 5 billion.”<sup>132</sup>

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<sup>128</sup> *World Population Trends*, UNITED NATIONS POPULATION FUND (Jan. 31, 2017), <http://www.unfpa.org/world-population-trends> (reporting, *inter alia*, that in the world’s least economically development countries, population is expected to double in the next 50 years); *see also* UNITED NATIONS POPULATION FUND, UNFPA STATE OF WORLD POPULATION: UNLEASHING THE POTENTIAL OF URBAN GROWTH 1 (2007) (reporting that in the 20<sup>th</sup> century the world population increased from 220 million to 2.8 billion) [hereinafter UNFPA].

<sup>129</sup> *See, e.g., The Consequences of Climate Change*, NAT’L AERONAUTICS AND SPACE ADMIN., <https://climate.nasa.gov/effects/> (last visited June 11, 2017).

<sup>130</sup> *See, e.g., MCKINSEY GLOBAL INST., BRIDGING GLOBAL INFRASTRUCTURE GAPS*, (2016), <http://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/bridging-global-infrastructure-gaps>.

<sup>131</sup> *See infra* notes 163–164 and accompanying text.

<sup>132</sup> UNFPA, *supra* note 128, at 1.

The majority of this growth, moreover, will occur in some of the world's poorest areas, including sub-Saharan Africa, south Asia, and southeast Asia.<sup>133</sup> Of the planet's majority urban dwellers, moreover, two out of five are expected to be living in "precarious" housing situations, creating conditions that no free housing market could keep up with.<sup>134</sup> Making the challenges even greater is the fact that much of this unplanned and unregulated—or, in the language of development studies, "informal"—growth will form into the expansion of mega-slums, where the challenges of providing for services such as sanitation, water, health, and mobility will be evermore pressing.<sup>135</sup>

Not surprisingly, research shows that these circumstances create concerns for the people who live in these conditions. For the world's poor majority, in fact, "protection of property rights, particularly rights to land and housing" is one of the three leading causes of concern.<sup>136</sup> This comes as no surprise to observers of urban change globally. This fact must be coupled with the recognition that, in many, if not most, of the places that these people live, individuals cannot rely upon the administrative state to initiate actions to defend them against harms of wide-reaching effect.<sup>137</sup> Moreover, in many such cases, the population is legally

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<sup>133</sup> *See id.*

<sup>134</sup> Agnès Deboulet, *Introduction* to AGENCE FRANÇAISE DE DÉVELOPPEMENT, *RETHINKING PRECARIOUS NEIGHBORHOODS* 9 (Agnès Deboulet ed., 2016). "Precarious" housing refers to the improvised and unstable slum conditions in which millions live globally, often located in environmentally unstable situations. As Janice Perlman described, discussing the Brazilian context, many such housing situations "have evolved over the years from 'jerry-built shacks' of wood or wattle and daub to brick-and-mortar dwellings several stories high...[M]any are built on hillsides, tidal marshes, garbage dumps or other undesirable spots . . ." JANICE PERLMAN, *FAVELA: FOUR DECADES OF LIVING ON THE EDGE IN RIO DE JANEIRO* 29 (2010).

<sup>135</sup> *Id.* at 16, 25; *see also* Janice Perlman, *Rethinking Precarious Neighborhoods: Concepts and Consequences of Marginality*, in *RETHINKING PRECARIOUS NEIGHBORHOODS* 39.

<sup>136</sup> Barendrecht & de Langen, *supra* note 3, at 250–71. The other two are personal security and the relationship issues of family and work. *Id.* at 252.

<sup>137</sup> A good example of this is Brazil's worst environmental tragedy, the Samarco disaster, in which toxic mud was released from a mining operation, inundating several towns, resulting in fatalities, injuries, and a host of other negative externalities. More than two years after the event, most of those affected had received little to no assistance and the environmental consequences remained largely unidentified, despite the fact that Brazil has, on paper, a robust and thoughtful environmental regulatory control system for toxics. On the administrative and judicial delays, *see*, for example, Ana Lucia Azevedo, *Dois Anos Depois de Tragédia, Vítimas de Mariana Aguardam Indenizações* [Two

uninformed and unaware of their rights.<sup>138</sup> The juxtaposition of these factors suggests an urgent need to depend on responses other than those that may already be available in better functioning democracies and, in turn, to rethink the agencies available to help defend those unaccustomed to fighting for their rights. For these reasons, I turn now to a consideration of rights that deserve attention, the mechanisms that help to achieve the rights, and the services that provide them.

### 1. *The Right to the City*

There have been calls for increased attention to the rights of those who are moving to cities and all that cities promise for future generations. These calls have focused on the fact that those who come to cities for employment, freedom, better health, and education, among other factors, are also those who, by their labor, turn cities into engines of economic growth and social transformation. Beginning in the late 1960s, most notably, the French Marxist philosopher and sociologist Henri Lefebvre articulated his now famous call for a “right to the city,” a notion that would serve the interests of all, including those most excluded from urban social, economic, and political benefits.<sup>139</sup> The concept of a “right to the city” sought to promote inclusion in the broadest sense for all urban inhabitants in political, economic, and social

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*Years After the Mariana Tragedy, Victims Await Indemnities*], O GLOBO, Nov. 29, 2017, <https://oglobo.globo.com/brasil/dois-anos-depois-de-tragedia-vitimas-de-mariana-aguardam-indenizacoes-22006567>; see also Ananda Martins Carvalho, *No Rio Doce, Dois Anos de Violência e Luta [In the Rio Doce, Two Years of Violence and Struggle]*, LE MONDE DIPLOMATIQUE, Nov. 23, 2017, <http://diplomatie.org.br/dois-anos-de-violencia-e-luta-no-rio-doce-samarco/>; see also Marcelo Leite, *Reparação Social é Mais Desafiadora que Recuperação de Ambiente em MG [Social Reparation is More Challenging than Recuperation of the Environment in Minas Gerais]*, FOLHA DE SÃO PAULO, Nov. 11, 2017, <http://www1.folha.uol.com.br/cotidiano/2017/11/1932953-reparacao-social-supera-recuperacao-de-ambiente-poluido-em-mariana-mg.shtml>. The government has asserted, not unreasonably, that Brazil has one of the most expansive regulatory apparatuses to avoid environmental harm in the world. Brazilian laws and regulations to address such situations exist, at least on paper. See *Governo do Brasil, Legislação ambiental no Brasil é uma das mais completas do mundo*, <http://www.brasil.gov.br/meio-ambiente/2010/10/legislacao> (last visited Feb. 17, 2018) (detailing a range of laws and regulations to impede harm, including environmental licensing and environmental crimes rules).

<sup>138</sup> See CLEP Report v. 1, *supra* note 3, at 30–45; cf. UNDP STRATEGY, *supra* note 29, at 51 n.69 (suggesting the importance of grassroots empowerment for, inter alia, legal knowledge).

<sup>139</sup> HENRI LEFEBVRE, WRITINGS ON CITIES 147–59 (Eleonore Kofman & Elizabeth Lebas eds. & trans., 1999).

terms. Furthermore, although much of his writing on cities remains at a high level of abstraction, Lefebvre's formulation did not ignore the need to give concrete expression to this right by promoting equal access to city services and benefits.<sup>140</sup>

The concept of the right to the city has had broad reception. At the World Urban Forum that began in the 2000s, for example, a World Charter for the Right to the City began to circulate, calling for recognition of the right to the city and illustrating the beginning of the global support for the right.<sup>141</sup>

a. *Brazil's City Statute and the Right to the City*

In legal terms, the right to the city has arguably gained no more forceful expression than in Brazil's 2001 City Statute.<sup>142</sup> As an early Brazilian commentator noted:

The City Statute deals with much more than urban land. With its holistic approach, the law covers the following areas: guidelines and precepts concerned with urban planning and plans; urban management; state, fiscal and legal regulation (particularly referring to landed property and real estate); tenure regularisation of informal properties; and social participation in the elaboration of plans, budgets, complementary laws and urban management, [and public-private partnerships].<sup>143</sup>

And as Edésio Fernandes has reminded us, its passage needs, in the Brazilian context, to be understood against the background of the unfulfilled legal promise that property comply not just with the wishes of individual owners, but also with its "social function," a Brazilian constitutional requirement since 1934.<sup>144</sup> In other words,

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<sup>140</sup> *Id.* at 154–55 (speaking of the need for what Lefebvre called "mature planning projects").

<sup>141</sup> See Francesca Perry, *Right to the City: Can This Growing Social Movement Win Over City Officials?*, THE GUARDIAN (Apr. 16, 2016), <https://www.theguardian.com/cities/2016/apr/19/right-city-social-movement-transforming-urban-space>.

<sup>142</sup> See Lei No. 10.257, de 10 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.7.2001 (Braz.) (Law 10.257 of July 10, 2001).

<sup>143</sup> Erminia Maricato, *The Statute of the Peripheral City*, in THE CITY STATUTE OF BRAZIL: A COMMENTARY 5–6 (Celso Santos Carvalho & Anaclaudia Rossbach eds., São Paulo: Cities Alliance & Ministry of Cities 2010) (official English translation with commentaries).

<sup>144</sup> Edésio Fernandes, *The City Statute and the Urban-Legal Order*, in THE CITY STATUTE: A COMMENTARY 55, 56, 61 (2010). The "social function" notion was first articulated by the French legal philosopher Léon Duguit, in a series of lectures delivered in Buenos Aires in 1911 and later collected and published as LÉON DUGUIT, LAW IN THE MODERN STATE, 38–40 (Frida Laski & Harold Laski trans., 1921) (establishing that the "social function" is a characteristic of public

the City Statute represented an important iteration in an ongoing effort to clarify the rights of Brazil's poor and working classes who have traditionally not shared in the country's wealth. As the country has become one of the most densely urbanized in the world,<sup>145</sup> this population's potential needs and demands are ever more evident.<sup>146</sup>

In terms of access to justice, what is striking about the City Statute is what it does not provide. For instance, although at the outset it speaks of the importance of "democratic administration" of Brazilian cities,<sup>147</sup> that is to be accomplished under the terms of the statute mostly by means of local, state, and national planning activities.<sup>148</sup> That is, the statute's focus is on administration and procedure rather than on the provision of a concrete expression of a robust notion of democratic governance. If a right is denied or not supplied, a citizen has no ready means to access to justice in order to resolve the claim.

To be sure, the City Statute by no means ignores a conception of participatory democracy and, in turn, access to justice. Article 43 deals with the need to "guarantee the democratic administration of the city" and to that end provides many participatory instruments, including: "I - urban policy counsels, at the national, state and municipal levels; II - debates, hearings and public consultations; III - conferences on subjects of urban interest, at the national, state and municipal level; IV - popular initiatives related to bills of law, plans, programmes and urban development projects . . ." <sup>149</sup> Article 44, in turn, requires some form of participatory budgeting, which is understood to "mean conducting debates, hearings and public consultations about the proposals of the multi-annual plan, the budget guidelines law and the annual budget as a mandatory condition prior to their approval by the City Chamber."<sup>150</sup> Finally, Article 45 provides that regional and local

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law generally).

<sup>145</sup> See THE WORLD BANK, *Urban Population*, <http://data.worldbank.org/indicator/SP.URB.TOTL.IN.ZS> (last visited June 11, 2017) (reporting that in 2016, nearly 86% of the Brazilian population was urban).

<sup>146</sup> See generally PERLMAN, *supra* note 134.

<sup>147</sup> Lei No. 10.257, Art. 2(II), de 10 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 11.7.2001 (Braz.).

<sup>148</sup> See *id.* at ch. IV.

<sup>149</sup> *Id.* at art. 43.

<sup>150</sup> *Id.* at art. 44; see also, e.g., Leonardo Avritzer, *Democratic Innovation and Social Participation in Brazil*, 9 J. DEMOCRACY 153–70 (2013) [hereinafter Avritzer 2013]; LEONARDO AVRITZER, *PARTICIPATORY INSTITUTIONS IN DEMOCRATIC BRAZIL* (2009).

“administrative entities” must “assure the compulsory and substantive participation of the population and of associations representing different segments of the community in order to guarantee to them direct control of administrative activities as well as assuring the population of complete exercise of citizenship.”<sup>151</sup> Unquestionably, then, the City Statute does envision an active and engaged role for citizens in urban management.

When one takes a step back and examines the actual form that participation is meant to take, however, it is impossible to escape the recognition that the statute expresses an elitist vision of participatory democracy. That is, it is a circumscribed vision of participation, in which change is processed through levels of administration. Imagine, for example, a citizen in a Brazilian city who fails to receive potable water while other, better-heeled citizens are receiving the service. The City Statute provides no direct mechanism to access justice in order to seek redress. While there are cases finding failures of compliance with the City Statute, they tend to be actions brought by large interests, including state actors, and not by individuals.<sup>152</sup> Indeed, the sorts of actions that may be brought under Brazilian law in order to assert violations of rights assured by the City Statute are limited to very restricted classes, from the President of the Republic, to the Brazilian equivalent of the American Bar Association and labor unions. Notably, there is no personal standing to assert a claim under the statute for ordinary Brazilian citizens.<sup>153</sup>

As a result, while one can say that the City Statute

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Participatory budgeting, which is now practiced across the world, started in the Brazilian city of Porto Alegre in 1990 and has been lauded as a successful model of a form of direct democracy; *see generally* BOAVENTURA DE SOUSA SANTOS, *DEMOCRATIZING DEMOCRACY: BEYOND THE LIBERAL DEMOCRATIC CANON* (2007).

<sup>151</sup> Lei No. 10.257, Art. 45, de 10 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 11.7.2001 (Braz.).

<sup>152</sup> *See* Colin Crawford, *A Função Social da Propriedade e o Direito à Cidade: Teoria e Prática Atual*, 41 app. A.1, Boletim do Instituto de Pesquisa Econômica Aplicada (IPEA), Texto para discussão 2882 (Mar. 2017), [http://www.ipea.gov.br/portal/index.php?option=com\\_content&view=article&id=29721&catid=397&Itemid=419](http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=29721&catid=397&Itemid=419) (appendix detailing Brazilian court treatment of cases that involved right to the city and other, related urban rights claims).

<sup>153</sup> *See* Lei No. 9.868, de 10 de Novembro de 1999, Diário Oficial da União [D.O.U] de 11.11.1999 (Braz.), established a “direct” right for alleged unconstitutional actions (*ação direta da inconstitucionalidade*). Article 2 of that statute established the class of persons who may bring the action. It is the principle vehicle for alleging violations of the City Statute, inasmuch as the City Statute takes its authorization from constitutional provisions. *See* Crawford, *supra* note 152.



contemplates an engaged citizenry in the articulation of its urban needs and aspirations, it lacks corresponding access to justice mechanisms when agreed-upon needs are not met, or when aspirations are satisfied inequitably. This suggests the need for normative solutions to allow for access to justice to secure the right to the city and urban living conditions generally.

## 2. *Rights Claims for Environmental Harms and Benefits*

The consequences of global industrialization, militarization, and rapid population growth, accompanied by reduced mortality, began to take their toll on the physical environment over the course of the twentieth century. Unsurprisingly then, by the late 1960s, in many quarters of the world there was a push for increased environmental legislation. In Stockholm in 1972, the United Nations held its first conference on the human environment and famously issued a declaration that recognized the urgency of protecting the human and physical environment.<sup>154</sup>

From the outset, the Stockholm Declaration speaks of rights, including “the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and [man] bears a solemn responsibility to protect and improve the environment for present and future generations.”<sup>155</sup> The Stockholm Declaration is a non-binding, soft law document, of course. The point is, however, that the instrument reflected a widespread sense of urgency, a sentiment that translated into the laws and regulations in hundreds of countries. Indeed, I would suggest that the notion in the Stockholm Declaration that nature itself has rights, also expressed in the 2008 Ecuadorian Constitution, is a direct translation of this sentiment.<sup>156</sup>

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<sup>154</sup> See U.N. Conference on the Human Environment, *Declaration of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (Chapter 1) (1972) [Stockholm Declaration].

<sup>155</sup> *Id.*

<sup>156</sup> Article 71 of that document provides as follows: “*La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos.*” [“Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structures, functions and evolutionary processes.”]. Constitución de la República del Ecuador, art. 71 (2008). I do not mean by this statement to disregard the novelty that the statement also contains, specifically its reference to the indigenous cosmivision of Pacha Mama— Mother Earth—and of her importance. What I am suggesting, however, is that in this and many other charters and laws across

The point to recognize is that most countries now contain environmental codes and regulations that, although of differing degrees of complexity and detail, reflect these concerns. Those codes and regulations in turn detail promises to deliver clean and safe physical and built environments.

a. *The Movement for Environmental Justice*

With increased regulation of the environment also came recognition that the distribution of environmental harms and benefits was inequitable. This recognition, beginning in approximately the early 1980s, led to what became a global movement for environmental justice.<sup>157</sup> The basic demand of the environmental justice movement (simply stated but difficult to implement) is to more fairly distribute—or, preferably, reduce in an equitable manner—the harms of industrial and military activities.<sup>158</sup> Subsequently, the movement also focused on the need for more equitable distribution of environment benefits, such as access to greenspace and recreational opportunities in the physical environment.<sup>159</sup> Globally, these ideas gained traction in laws and regulations. United States President Bill Clinton, for example, demanded that all United States federal government agencies engage in environmental justice reviews for their major activities.<sup>160</sup> The Colombian Constitution of 1991 requires that

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the world since the early 1970s one can now easily find recognition of the importance of environmental protection. For one exploration of the significance and limits of the Ecuadorian constitutional provision, see Michelle P. Bassi, Note, *La Naturaleza o Pacha Mama de Ecuador: What Doctrine Should Grant Trees Standing?* 11 OR. REV. INT'L L. 461 (2009).

<sup>157</sup> See e.g., VANDANA SHIVA, *EARTH DEMOCRACY: JUSTICE, SUSTAINABILITY AND PEACE* (2015); U.N. DEVELOPMENT PROGRAMME, *ENVIRONMENTAL JUSTICE: COMPARATIVE EXPERIENCES IN LEGAL EMPOWERMENT* (June 2014); GORDON WALKER, *ENVIRONMENTAL JUSTICE: CONCEPTS, EVIDENCE AND POLITICS* (2012); ROBERT EMMET HERNAN, *THIS BORROWED EARTH: LESSONS FROM THE FIFTEEN WORST ENVIRONMENTAL DISASTERS AROUND THE WORLD* (2010); THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael B. Gerrard & Sheila R. Foster, eds., 2d ed., 2009); LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* (2001).

<sup>158</sup> See, e.g., Philip Weinberg, *Equal Protection*, in THE LAW OF ENVIRONMENTAL JUSTICE: CONCEPTS, EVIDENCE AND POLITICS, *supra* note 157, at 3–23.

<sup>159</sup> See, e.g., Colin Crawford, *Environmental Benefits and the Notion of Positive Environmental Justice*, 32 U. PA. J. INT'L L. 911 (2011).

<sup>160</sup> See Executive Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

property serve not only its social purpose, but also its “ecological” function.<sup>161</sup> These are two of many such examples, indicating that rights have been created to enjoy a healthy human and physical environment for all.

b. *Rights without Defenders*

The concern, however, is that it is much more difficult to vindicate rights claims for environmental harms and benefits. In the United States, once looked to as a leader in environmental protection, standing rules have been dramatically cut back in recent decades, making it difficult for individuals to challenge violations that do not cause them direct personal harm.<sup>162</sup> Those in the United States and most parts of the world remain reluctant to allow aggressive enforcement of collective and diffuse rights.<sup>163</sup> Elsewhere, even where rights may in theory be vindicated by those seeking to protect collective or diffuse rights, the weakness of other sectors—such as a non-profit sector with limited funding staffed by trained professionals able to assert actions—can inhibit assertion of these rights.<sup>164</sup>

C. *Efforts to Establish International Norms Relevant for Vindicating Urban and Environmental Rights*

Following the Stockholm Conference, its eponymous

<sup>161</sup> The Constitution of the Republic of Colombia provides, in relevant part, as follows: “*La propiedad es una función social que implica obligaciones. Como tal, le es inherente una función ecológica.*” [“Property is a social function that implies obligations. As such, there is inherent to it an ecological function.”] Constitution of the Republic of Colombia, art. 58 (2011).

<sup>162</sup> On the development of this limiting standing doctrine, see, e.g., Christopher Warshaw & Gregory E. Wannier, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL’Y REV. 289 (2011). Of course, as recently as the mid-1980s, expanded standing, not just in the U.S. but elsewhere, appeared to be the developing norm. See, e.g., Cappelletti et al., *supra* note 2, at 232–36.

<sup>163</sup> For example, while Brazil’s 1988 Constitution authorized the Public Ministry to defend “diffuse and collective interests”—Constitution of the Federative Republic of Brazil, art. 129, cl. III (1988)—the choice to do so remains with the prosecutors, members of an elite legal class. Constitution of the Federative Republic of Brazil, art. 129, cl. III (1988). Individual citizens do not have individual standing to seek defense of such interests. See Crawford, *supra* note 152.

<sup>164</sup> See Susan Rose-Ackerman, *Access to Government in Eastern Europe: Environmental Policymaking in Hungary*, in THE STATE OF ACCESS: SUCCESS AND FAILURE OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES 71 (Jorrit de Jong and Gowher Rizvi eds., 2008).

Declaration, and subsequent United Nations and other multinational conferences on urban and environmental matters,<sup>165</sup> there has been a push to create mechanisms at the international, regional, and state levels to vindicate urban and environmental rights. This section will briefly examine what has become the leading example of such efforts, namely the 1992 United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters—commonly known as the Aarhus Convention, after the Danish city where it was signed.<sup>166</sup> The focus here will be narrow, considering only the relevance of the Aarhus Convention to access to justice. The Aarhus Convention is a long and complicated document and one that has received significant scholarly and other attention.<sup>167</sup> My aim here is, therefore, to focus simply on the challenges in turning its terms into concrete mechanisms to defend individual, collective, and diffuse rights. For purposes of analysis, the discussion will be restricted to two examples in the region where Aarhus has arguably received the most attention: the European Union.

The Aarhus Convention has three basic aims: to ensure that the public has 1) access to information about matters affecting the environment; 2) the opportunity to participate in decisions affecting the environment; and 3) “access to justice in environmental matters.”<sup>168</sup> In fact, the phrase or a variant of the phrase “access to justice” appears in nearly every article of the Aarhus Convention, and Article 9 of the document is devoted entirely to the subject.

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<sup>165</sup> See, e.g., GÜNTHER HANDL, DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT (STOCKHOLM DECLARATION), 1972 AND THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, 1992, AVAILABLE AT UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, <http://legal.un.org/avl/ha/dunche/dunche.html> (last visited June 11, 2017); see also Peter H. Sand, *The Evolution of International Environmental Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 29, 29 (Daniel Bodansky et al. eds., 2007).

<sup>166</sup> See Convention on Access to Information, Public Participation to Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Convention on Access to Information].

<sup>167</sup> See, e.g., Jonas Ebbesson, *Public Participation*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 165, at 682–702; MARC PALLEMAERTS, THE AARHUS CONVENTION AT TEN: INTERACTIONS AND TENSIONS BETWEEN CONVENTIONAL INTERNATIONAL LAW AND EU ENVIRONMENTAL LAW (2011).

<sup>168</sup> Convention on Access to Information, *supra* note 166, at Art. 1.

For purposes of this discussion, two provisions in Article 9 are of special interest. First, Article 9 provides that “members of the public concerned” who have a “sufficient interest or, alternatively,” maintain “impairment of a right” pursuant to relevant national law, shall have “access to a review procedure.”<sup>169</sup> While the Article recognizes, as it must, that “[w]hat constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law” it also, nonetheless, provides that this must be done consistent “with the objective of giving the public concerned wide access to justice.”<sup>170</sup> Importantly, Article 9 specifies that the public can, for such purposes, be represented by non-profit organizations (NPOs). Second, Article 9 provides that parties to the Convention “shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”<sup>171</sup>

Thus, by recognizing the role of civil society actors to defend the rights of many, the Aarhus Convention acknowledges the collective and diffuse nature of many environmental rights. This provides a useful, functional, normative definition in answer to the question of who can access justice when it comes to environmental (or, for that matter, urban) matters. Moreover, the Aarhus Convention also helpfully recognizes the fact of access to justice barriers, financial and otherwise, again opening an important door to crafting norms as to what access to justice should mean.

Available evidence suggests, however, that even within the relatively well-resourced European Union, which acceded to the Aarhus Convention in 2005,<sup>172</sup> these aspirations are not being fulfilled. This failure persists despite the 2006 passage of a regulation by the European Parliament and Council, known as the “Aarhus Regulation,” the purpose of which is to facilitate compliance with the treaty’s terms. Hendrik Schoukens has observed as follows:

EU courts have consistently rebuked pleas for a softening of the standing requirements in the context of direct actions against

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<sup>169</sup> *Id.* at art. 9(2)(b).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at art. 9(5).

<sup>172</sup> The Convention itself entered into force in 2001. For details on the Convention, see UNITED NATIONS TREATY COLLECTION, *Chapter XXVII: Environment*, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XXVII-13&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXVII-13&chapter=27&clang=_en) (last visited June 11, 2017).

EU acts that might have an impact on the environment and/or public health. In addition, the internal review procedure set out by the 2006 Aarhus Regulation has been interpreted so restrictively by the EU institutions that its added value in the stride toward better access to courts in environmental matters remains ephemeral at best.<sup>173</sup>

This is not an exaggerated claim. As Schoukens notes, EU courts continue to apply a 1963 judgment that restricts standing to persons directly interested in a matter or those who, “by reason of circumstances,” are “differentiated from all other persons.”<sup>174</sup> The effect of such a ruling as applied to a collective or diffuse right is to dramatically restrict standing, as it requires identifying plaintiffs who have suffered particular harms. As in United States environmental standing jurisprudence, the effect is to discourage litigation seeking to redress group rights or alter actions that affect collective and diffuse interests.<sup>175</sup> One response of the EU courts has been to argue that their restrictive standing ruling does not foreclose the possibility of seeking redress in national tribunals. This has proven something of an empty promise, however, since standing rules are, in general, even more individually-focused in national courts, and potential plaintiffs are often limited from advancing claims for other procedural reasons.<sup>176</sup>

The above is not to say that Article 9 does not hold promise for continuing to shape notions of access to justice in environmental (and, by extension, urban) matters. It does suggest, however, that the significant structural and institutional hurdles faced by those seeking to expand access to justice in the urban and environmental realms remain considerable.

### III. ACCESSING URBAN AND ENVIRONMENTAL JUSTICE

In Part I, I examined leading access to justice theories, examining both their strengths and their weaknesses. Part II

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<sup>173</sup> Hendrik Schoukens, *Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited?*, 31 *UTRECHT J. INT’L & EUROPEAN L.* 46, 46 (2015).

<sup>174</sup> Case 25/62, *Plaumann & Co. v. Comm’n of the European Cmty.*, 1963 *E.C.R.* 96.

<sup>175</sup> I refer particularly to the steady tightening of the potential for standing to advance collective interests since the 1980s, notably under the direction of the late United States Supreme Court Justice Antonin Scalia. See James E. Pfander, *Scalia’s Legacy: Originalism and Change in the Law of Standing*, 6 *BRIT. J. AM. LEGAL STUD.* 85, 90 (2017).

<sup>176</sup> Schoukens, *supra* note 173, at 47.

focused on a different problem entirely, namely the urban and environmental challenges faced by the world's majority urban population. Part II thus demonstrated both how a great deal of energy has been invested to theorize concepts like "the right to the city" and "environmental justice" and how those theories have been given concrete expression. Importantly, too, Part II demonstrated that a challenge for defending the rights of people to enjoy clean, safe, productive urban environments is that the harms are often collective and diffuse—which creates challenges for our traditional notions of who can seek to redress a harm and how to assess liability.

This Part will offer some thoughts on how those challenges can begin to be addressed in order to provide access to justice to large numbers of people experiencing urban and environmental harms. This Part thus seeks to integrate the issues addressed in the previous two Parts. It asks what basic steps are necessary to begin to provide access to justice. In this, the Part does not seek to be exhaustive, but rather to provide initial thoughts for first steps to secure access to justice for the four billion individuals living in often dangerous and unsanitary urban environments. This discussion will suggest that urban and environmental challenges should be priorities when seeking to provide justice. If a person cannot live day-in and day-out in a dignified, healthy environment, it is hard to fathom how he or she can be a productive, content member of the society in which he or she exists.

This Part asks, and seeks to explore, two questions. First, it asks whether the broad label of "access to justice" has a role in guaranteeing urban and environmental rights. The Part answers this question in the affirmative and then proceeds to ask, second, what might constitute important elements of justice in the urban and environmental context. A standard formulation of access to justice, for example, provides that "access to justice is the rule of law as it works out in practice for individuals."<sup>177</sup> However, as the previous discussion has demonstrated, and as this Part will continue to show, the focus on individual rights has limited utility as an organizing concept in the urban and environmental context. Therefore, it is necessary to consider the ways in which the collective and diffuse nature of many urban and environmental rights claims would require us to change our definition of access to justice.

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<sup>177</sup> Barendrecht & de Langen, *supra* note 3, at 254.

A. *Access to Justice in the Urban and Environmental Context*

Given the magnitude of the urban and environmental (and often urban-environmental) challenges the world is facing, action must be taken to address them. Moreover, it would be naïve to suppose that governments alone can or should be responsible for directing the nature of the response.<sup>178</sup> Therefore, it is essential to widen the definition of “access to justice” so that more citizens may actively engage in the search for effective solutions to assure clean, healthy, and livable cities and physical environments. The central question addressed by this Article, of course, is how.

In Part I, I identified four theoretical positions seeking to answer the question of how best to achieve access to justice. Of these, two can be set aside as impracticable in the urban and environmental context, at least insofar as the protection of collective and diffuse rights is concerned. The first position to be set aside is what was labelled the “law-focused and top-down” position. As indicated in the discussion above, the proposals from this camp are so resource-intensive that it would be excessively optimistic to assume that these models, with their institution-heavy and cost-intensive proposals, could be replicated to help defend the rights of the four billion people who now receive little, if any, justice when they do not have, for instance, potable water or reliable sanitation. Moreover, it is of concern that this theoretical position—arguably the leading academic view of access to justice—is heavy on principle and weak on providing clear metrics for success or failure; it lacks “substantive evaluation criteria.” As Barendrecht has observed, this

literature talks a lot about effectiveness. Until now, there is little precision in the criteria for this in the literature. For instance, there is no agreed and operational definition of sufficient access to justice. [Deborah Rhode’s book, *Access to Justice*], [t]he most cited book on access to justice does not contain a clear definition of the concept.<sup>179</sup>

Clearly, if the phrase “access to justice” is to have any meaning, especially in the large swaths of the world without developed traditions and systems for access to justice, clear definitions and precise criteria to measure the success of what has been defined and implemented are essential.

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<sup>178</sup> Indeed, the conditions in which most people live suggest they cannot. See generally UNDP STRATEGY, *supra* note 29.

<sup>179</sup> Barendrecht, *supra* note 53, at 300.



The second position to be set aside is less helpful for different reasons. The fourth position presented, labelled “integrated but not requiring law,” has much to recommend. It is less openly confrontational, characterized more often by dependence on efficient and comparatively cheap dispute resolution mechanisms than any of the other positions. However, as also noted in the discussion, it is a position that works because it is characteristic of situations in which there is a shared interest in the sustainable management of one or more natural resources. By definition, this endeavor unites parties around that goal. By contrast, the kind of urban or environmental issue that most commonly must be addressed today—the construction of a cleaner and more efficient transportation system, for example, or an effort to reduce contamination of groundwater by mining interests—brings together stakeholders who do not share the same goal and can often be highly antagonistic to one another. Consequently, in terms of widening access to justice, the “integrated but not requiring law” position cannot be deemed a suitable one to shape normative articulation for expanded urban and environmental justice access.

That leaves two theoretical positions—what I labelled as the “law-focused and bottom-up” and “integrated and requiring law” access to justice positions. Importantly, both positions differ from the “law-focused and top-down” approach in that their primary concern is the demand side of justice and not the supply side. For the four billion who have little to no access to justice, that is significant. But before considering which position provides a better theoretical framework for the articulation of urban and environmental justice norms, four concerns about the content that any normative framework for expanded urban and environmental justice should have must be identified.

First, unlike the resource management situations that the “integrated but not requiring law” position seeks to protect, the sorts of urban and environmental problems contemplated here are those of large scale that tend to affect a wide range of interests, people, and stakeholders. This is to say they will present situations of conflict. To be effective, the access to justice model will need to be transparent and clearly defined and organized. Without these qualities, confidence is likely to be low, impeding success.

Second, the actions contemplated here—and the norms that will be required to defend them—will often be aimed to achieve equitable results. This will be especially true in the urban context, where the dramatic inequality of most world cities today is a

dominant characteristic.<sup>180</sup> That will mean taking steps that direct resources from the “haves” (or the have-mores) to the “have-nots” (or the have-lesses).

Third, a model for expanded urban and environmental access to justice needs to account for the highly privatized, concentrated, and problematic nature of land holding in much of the world.<sup>181</sup> This situation effectively makes it impossible for millions of people to have any real prospect of securing land tenure, urban or rural.<sup>182</sup> It also makes infrastructure expansion and improvements—matters that affect the nature of cities and their physical environments—challenging and difficult. It is unlikely that those historically excluded from elitist decisions about land use will be able, without support and assistance, to advance successful claims.

Fourth and finally, any practicable set of solutions must acknowledge the limited resources—both in terms of trained human capital and financial resources—available for the realization of significantly expanded access to justice in much of the economically developing world. Barring any political or social change that will lead to the redistribution of wealth held by global elites,<sup>183</sup> most governments have strained budgets ill-equipped to attend to, must less to pursue, increased demands for access to justice.<sup>184</sup>

In light of the above factors, the “law-focused and bottom-up” position is, at least for the present, a much better candidate for promoting justice access for the four billion largely without it than

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<sup>180</sup> See U.N. Human Settlements Programme, *supra* note 7, at xxiii (“Among the most significant challenges that urban planning has to address in the next few decades, especially in developing countries, are increasing poverty and inequality, as well as to the rapidly expanding urban informal sector.”).

<sup>181</sup> See EDÉSIO FERNANDES, LINCOLN INST. OF LAND POLICY, REGULARIZATION OF INFORMAL SETTLEMENTS IN LATIN AMERICA 7–8, 14–17 (2011).

<sup>182</sup> See *generally id.*; HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* (2008).

<sup>183</sup> See Jorrit de Jong and Gowher Rizvi, *The Dynamics of Access: Understanding “the Mismatch”*, in *THE STATE OF ACCESS: SUCCESS AND FAILURE OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES* 276 (Jorrit de Jong & Gowher Rizvi eds., 2008) (noting, for example, “a general decline of commitment to the social compact and a separation between the discourse on programs and the discourse on revenues have led public managers to balance their books strategically by limiting access to public benefits”).

<sup>184</sup> See de Jong and Rizvi, *supra* note 16, at 29–31; Barendrecht & de Langen, *supra* note 3, at 260–61 (observing the social and economic challenges facing developing countries).

the “integrated but requiring law” position associated with the legal empowerment thinkers. This is so for at least two substantive reasons.

First, the “law-focused and bottom-up” position advances a model based on metrics, measures that can be implemented to chart successes and failures. Barendrecht, for example, has proposed a model informed by practices in the health care sector. This method first identifies the legal problems that need attention. As he notes, work in recent decades has identified similar legal problems across cultures and societies.<sup>185</sup> This has the advantage of comparing methods for addressing particular categories of legal problems and, one hopes, to develop best practices in the process.

Second, this model emphasizes the importance of accountability and the need to develop uniform criteria to measure the accountability of justice actors.<sup>186</sup> This will require, as Barendrecht and others, including the World Justice Project, recognize, observing a practice of trial and error. It begins with basic surveys asking questions like whether the parties involved were satisfied with the results of their dispute.<sup>187</sup> While such surveys are not cost-free, neither are they especially costly and, as advocates of this form of evidence-based treatment for legal problems note, similar methods have been used with success globally in sectors from health to corrections.<sup>188</sup>

With respect to the four concerns noted above applicable to urban and environmental problems, the above approach is promising. First, given that there are a wide range of stakeholders, this evidence-based treatment of legal problems can help provide better clarity of the factors impeding successful service delivery. Similarly, and secondly, identifying the gaps in service delivery will provide more objective bases upon which to justify reallocation of resources. Third, such surveys will provide documentation of the limitations of many social actors and groups—economic, cultural, language, and geographic factors, for example.<sup>189</sup> In the context of legal problems that are of a collective and diffuse nature, like many urban and environmental legal problems, this evidence-based method will permit rethinking the

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<sup>185</sup> Barendrecht, *supra* note 53, at 295.

<sup>186</sup> *See id.* at 297–303.

<sup>187</sup> *See id.* at 299–300.

<sup>188</sup> *See id.* at 301.

<sup>189</sup> *See supra* note 113 and accompanying text on the role of gatekeepers.

question of who may assert a claim, and how to represent the persons and groups whose rights are being denied. Fourth and finally, evidence-based results are always preferable when resources are tight, as they provide clear data on how to make difficult or controversial decisions.

By contrast, the ambitious, but under-theorized approach of the legal empowerment thinkers, with their “integrated but requiring law” approach, has less to support it as a workable model. As de Langen and Barendrecht trenchantly wrote in a sympathetic, if critical, assessment of this position:

[T]he idea of legal empowerment is broader than strict access to justice. . . . [T]he notion of legal empowerment is a more instrumental perspective on the law, a way of seeing how the legal system as a whole underpins the functioning of society and the workings of the economy.<sup>190</sup>

This breadth of focus both constitutes the appeal of, and reveals the weakness of, this position as a workable one for improving and expanding access to justice. On the one hand, it focuses forcefully on the range of factors that impede billions of people from living healthy, full lives. It looks to local needs and practices as guides for solutions. On the other hand, it blurs the line between law and other factors (social organization and the economy, for example) that shape lives and living conditions, making it nearly impossible to use the approach as a way of making informed choices based on a consistent set of factors to improve access to justice. Moreover, with respect to the possible vindication of urban and environmental rights that are the focus of this Article, the “integrated but requiring law” position focuses heavily on questions of property rights,<sup>191</sup> which, while an important part of the urban and environmental equation, are not the only questions that matter to those without access to justice.

### B. *The “What” and “When” of Urban and*

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<sup>190</sup> Barendrecht & de Langen, *supra* note 3, at 263–64.

<sup>191</sup> In the case of the CLEP report, this is arguably a consequence of the influence of CLEP Co-Chair (with Madeleine Albright) Hernando de Soto. This has been a much-criticized aspect of CLEP’s deliberations and products. *See, e.g.*, van Rooij, *supra* note 53, at 307 (citing criticisms); Mathew Stephens, *The Commission on Legal Empowerment of the Poor: An Opportunity Missed*, 1 HAGUE J. ON RULE L. 132, 139–41 (2009) (criticizing de Soto’s involvement); Jan Michael Otto, *Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto*, 1 HAGUE J. ON RULE L. 173, 174–75 (2009) (same).

### *Environmental Access to Justice*

If the goal is for people to be able to live dignified, productive lives, a significant part of achieving that end is to assure that the physical and built environments in which they pass their lives are clean, safe, healthy, and orderly. As documented in this Article, however, that is rarely the case. Given the often dirty, unsafe, and unhealthy conditions in which millions of people live the world over, it would be naïve to assume that governments can, or intend to, reverse this situation. Therefore, it is essential to provide alternative means for the population to realize notions like the right to the city and environmental justice. The “law-focused, bottom-up” model offers the best candidate to do so, because it is an approach that consists of measurable metrics, comparative methods, and an emphasis on accountability constantly evaluated.

However, there remains the problem of how to scale up this method for the sort of collective and diffuse rights claims that characterize so many urban and environmental rights claims. To that end, I suggest that it is necessary to undertake three additional measures: committing to a robust effort of urban and environmental education, creating deep and widespread opportunities for participation in decisions about urban structure, and providing access to simple pleading and consolidation of similar claims with relaxed standing requirements.

A key aspect of these measures is that they are relevant for the expression of collective and diffuse interests. To be sure, individuals may suffer special urban and environmental harms that merit redress. However, more than these types of individuated harms—financial scams or crimes against the person, for example—the collective and diffuse nature of urban and environmental harms demands a different response than one focused merely on individual redress, if justice is to be both accessed and achieved.<sup>192</sup> These three elements aim to respect the characteristic features of urban and environmental harms requiring redress.

#### 1. *Urban and Environmental Education*

This element will require a commitment by global, national, and local actors to engage in widespread urban and environmental

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<sup>192</sup> The challenges of defending diffuse and collective rights have been widely explored. *See, e.g.*, LAURA GARCÍA ÁLVAREZ, DANOS AMBIENTALES TRANSNACIONALES Y ACCESO A LA JUSTICIA 35–47 (2016).

education,<sup>193</sup> at the most local level possible, on matters ranging from the right to the city and environmental justice to the nature of environmental contamination and the options for improved, cleaner surroundings. That is, there must be a deep and engaged commitment to educating the citizenry on matters affecting their well-being, in language they understand. Evidence suggests that does not always occur.<sup>194</sup> This is of concern since rights cannot be asserted if the holders of them are not aware that they are available. Improving the quality of the built and physical environment must begin not only with people understanding what is possible for them and their surroundings, but also with efforts to understand how their surroundings may fail to be promoting their wellbeing and best functioning.

In terms of the theoretical models reviewed in Part I, this sort of education is not central to the access to justice advocated by those like Deborah Rhode who advocate the “top-down, law-focused” approach. As indicated, this approach, while recently expanding the menu of what measures might help promote justice access, disproportionately focuses on increasing relatively costly services from trained professionals.<sup>195</sup> By contrast, CLEP, and to a lesser extent the initiatives in Aarhus, contemplate a more engaged public. This is also true of the “law-focused, bottom-up” theorists, for whom citizen engagement is key.<sup>196</sup>

However, it must be acknowledged that a commitment to deep and widespread urban and environmental education would bear its own significant costs. The approach is time-intensive and

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<sup>193</sup> The environmental education literature is vast, but it is also diffuse. *See, e.g.*, INTERNATIONAL HANDBOOK OF RESEARCH ON ENVIRONMENTAL EDUCATION (Robert B. Stevenson et al. eds., 2012); CHARLES SAYLAN & DANIEL BLUMSTEIN, THE FAILURE OF ENVIRONMENTAL EDUCATION (AND HOW WE CAN FIX IT) (2011). Different institutional actors have elaborate environmental education programs, such as the United Nations Environmental Programme Environmental Education and Training Program, information about which is available at U.N. ENVIRONMENT, *Education and Training*, <http://www.unep.org/training/> (last visited June 11, 2017). The education imagined here would focus on the rights that people can have with respect to their environment, and how they can be actors with a direct voice in the transformation of their environment.

<sup>194</sup> SAYLAN & BLUMSTEIN, *supra* note 193, at 38–56.

<sup>195</sup> *See, e.g.* Rhode, *A Roadmap for Reform*, *supra* note 2, at 1241–56.

<sup>196</sup> *See, e.g.*, van Rooji, *supra* note 53, at 304 (noting that “bottom-up interventions improve[] legal knowledge, economic well-being, gender equality, land tenure security, and participation”) (citing ASIAN DEVELOPMENT BANK, LEGAL EMPOWERMENT: ADVANCING GOOD GOVERNANCE AND POVERTY REDUCTION 127–33 (2001)).

requires political will. Individuals must be trained and then fan out and replicate their training. That is never an easy proposition.<sup>197</sup>

## 2. *Participation*

Participation is of course a hallmark of the Aarhus Convention and of CLEP and related legal empowerment theories. It is not a central facet of the “top-down, law-focused” approach, except to the extent that that theoretical framework seeks to enable more individuals to participate in proceedings managed by others who seek to secure their rights. Perhaps the most celebrated, successful example of a participatory form of democracy emerged not in a wealthy, economically and politically developed country, but in an economically developed country emerging from a political dictatorship. I refer, of course, to the example of participatory budgeting that began in southern Brazil in 1990 and has spread globally since then.<sup>198</sup> This movement should give us some hope about the potential to increase participation and, in turn, access to justice. Moreover, it is arguably especially important to focus on participation as an element of access to justice in urban and environmental contexts. First, the widescale environmental ills that characterize so much contemporary urban settlement demonstrates vividly the absence of state actors.<sup>199</sup> Therefore, part of access in the urban and environmental context must mean inclusion—via a mechanism that can connect state actors and the previously excluded citizenry. Some form of participation in

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<sup>197</sup> Anwar Shah explores some of these challenges in Anwar Shah, *Demanding to Be Served: Holding Governments to Account for Improved Access*, in *THE STATE OF ACCESS: SUCCESS AND FAILURE OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES* 207, 219–20 (Jorrit de Jong & Gowher Rizvi eds., 2008).

<sup>198</sup> Participatory budgeting refers to a process whereby a percentage of a municipal budget is set aside each year and its allocation is decided by some mechanism that involves the widest possible public involvement. The aim, thus, is to give the public direct ownership of and responsibility for public spending. See Avritzer 2013, *supra* note 150, at 157. Participatory budgeting is used widely today across the world. See *supra* text accompanying note 150. Although slow to come to the United States, it is beginning to be used here as well. See, e.g., METRO COUNCIL DISTRICT, *Participatory Budgeting & District 8 Spending Information*, <https://louisvilleky.gov/government/metro-council-district-8/participatory-budgeting-district-8-spending-information> (last visited Aug. 28, 2018) (discussing introduction in August 2018 to Louisville, Kentucky).

<sup>199</sup> See PERLMAN, *supra* note 146; FERNANDES, *supra* note 181; Deboulet, *supra* note 134, at 17; Janice Perlman, *Rethinking Precarious Neighborhoods: Causes and Consequences of Marginality*, in *AGENCE FRANÇAISE DE DÉVELOPPEMENT, RETHINKING PRECARIOUS NEIGHBORHOODS*, *supra* note 134, at 40.

decisionmaking, with an eye to produce more regular, healthier human settlements and environments, will surely enhance access to justice.

The example of participatory budgeting is thus an important one to consider. The question is, then, what would participation look like in the case of urban and environmental decisions? In response, I suggest that a three-pronged approach, informed by participatory budgeting, would be useful.

First, the participatory budgeting models developed in Brazil and modified in many other contexts (places different in culture and degree of economic development)<sup>200</sup> could be adapted to decisionmaking about infrastructure projects. For example, structured participatory processes would have avoided the confusion in 2015, in the massive Rio de Janeiro shantytown of Rocinha, when the government announced it was going to install a gondola to allow inhabitants to be transported up and down the slum's hills. To the government's surprise and consternation, residents organized and indicated that, if they had to choose, they would choose improved sanitation services over transportation innovation.<sup>201</sup> This sort of participation would, furthermore, constitute a form of access to justice, because it would mean that people's own judgment about their needs was recognized, a vindication of personal and concurrently, of a group right to a salubrious environment.

Second, in cases of harm from water, air, or ground contamination affecting human and plant health, for instance, a participatory principle would provide that upon the occurrence of an event, the public would have a right to express concerns and participate in the collection of information about the harm. This, too, would be a form of providing access to justice, because it would recognize the value of popular concerns about events directly affecting individuals and communities.

Third, such participation could help promote faster resolution of claims once harm has occurred. To again use a Brazilian example, consider how different the maddeningly elusive

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<sup>200</sup> See generally Santos, *supra* note 150.

<sup>201</sup> See Felipe Betim, *A Rocinha Não Precisa de Teleférico, Mas Sim de Saneamento Básico* ["Rocinha Does Not Need a Gondola but Basic Sanitation"], EL PAÍS (Braz.) (Sept. 12, 2015), [http://brasil.elpais.com/brasil/2015/09/03/politica/1441270863\\_849228.html](http://brasil.elpais.com/brasil/2015/09/03/politica/1441270863_849228.html) (explaining that residents of the slum characterized by steep hills preferred basic sanitation over a proposed gondola system so as to reduce disease incidence).



settlement and remediation of the harms of the November 2015 Samarco mining disaster might have been had all stakeholders been immediately given a means to share their experience, record their harms, and receive speedy resolution of them.<sup>202</sup>

Again, this participatory element of the access to justice arguments offered here is not one that fits easily in the “law-focused, top-down” access to justice model. In part, this is because its definition of “justice” is much broader, understanding justice to include the right of people to live in clean, safe, and healthy environments. It is more closely compatible, however, with both the “law-focused, bottom up” and legal empowerment views (the latter being what I have called “integrated and requiring law”). In the application of both frameworks, legal principles and guidelines would be needed to determine the terms and conditions of participation. Moreover, it is worth noting that both steps would involve better-informed citizens if the educational measures discussed above were implemented.

### 3. *Procedure*

As noted above, restrictions on standing continue to impede the successful assertion of collective and diffuse rights claims.<sup>203</sup> Therefore, access to justice for cleaner, healthier, better ordered urban and physical environments will require the articulation of standing rules that do not insist, for example, on principles like proof of individual harm. That is not the way most urban and environmental harms are suffered. Just as the education and participation elements are envisioned to allow for widespread

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<sup>202</sup> On November 5, 2015, in the central Brazilian state of Minas Gerais (the state name itself means General Mines), between 32 and 40 cubic tons of toxic mud were released when a retention dam from a mining operation failed. The ensuing flood of toxic mud and sludge killed 19 and inundated villages—including historic UNESCO sites. The flood destroyed thousands of hectares of property and contaminated major water supplies for the region. The cleanup continues, as do complaints from stakeholders like local residents and town officials. See, e.g., Dom Phillips, *Samarco Dam Collapse: One Year on from Brazil's Worst Environmental Disaster*, THE GUARDIAN (Oct. 15, 2016), <https://www.theguardian.com/sustainable-business/2016/oct/15/samarco-dam-collapse-brazil-worst-environmental-disaster-bhp-billiton-vale-mining> (last visited Feb. 23, 2018). Moreover, nearly two years after the disaster, there was no evident settlement in site. See, e.g., Daniel Camargos, *Tentativa de Acordo para Reparar Danos No Rio Doce Recebe Críticas* [Attempted agreement to repair harms from the Rio Doce receives criticisms], FOLHA DE SÃO PAULO (Mar. 10, 2017).

<sup>203</sup> See *supra* notes 173–175 and accompanying text.

inclusion in acquiring information and making decisions as elements of access to justice, so too the redress of grievances must be understood to permit those with the time, resources, and energy to step in and defend the collective and diffuse urban and environmental interests at issue.

C. *Summary of Normative Ideal for Justice Access Principle  
Articulation in the Urban and Environmental Context*

In sum, the argument advanced here suggests that access to justice for speedier resolution of urban and environmental concerns can be affected by a tripartite strategy which works to educate, involve, and hasten access to justice for claim resolution when needed. The normative value of such a strategy is both simple and appealing: the first two steps (education and participation) serve to reduce the need for redress, while the third acknowledges that some conflict is inevitable and, by having a more informed and involved citizenry, access to justice can be widened. Moreover, the approach promotes greater transparency because it recognizes that an aware and involved citizenry is more likely to insist on securing its rights than in the current situation. Currently, there is no lack of “good” urban and environmental laws, but many of those laws create entitlements that are widely unknown to those they are designed to protect, or are effectively unavailable to them because of difficult standing requirements.

A central question, of course, as with any proposal to create a new normative framework, is how best to pay for it. Any search for such solutions should both be equitable and should focus on serving the whole population—and thus on the collective and diffuse interests that typically characterize urban and environmental claims. I suggest that, in this context, the options are neither terribly unusual nor difficult to implement. In environmental matters, for example, the principle of “cradle to grave” financial responsibility for the creation of substances dangerous to the physical environment has long been successful in the United States and elsewhere as a strategy to diminish environmental harms.<sup>204</sup> A more widespread use of this principle,

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<sup>204</sup> I refer, for example, to the hazardous waste management and disposal rules announced in the Resource Conservation and Recovery Act (RCRA) of 1976. *See, e.g.*, 42 U.S.C.A. § 6921 (a)–(b) (on listing, identification and management of hazardous wastes). On the financial mechanisms used to effect the goals of RCRA and similar statutes, *see, for example*, U.S. ENVTL PROTECTION AGENCY, *Waste, Chemical and Clean-up Enforcement*, <https://www.epa.gov/enforcement/waste->

together with now widely recognized principles like the precautionary and polluter pays principles,<sup>205</sup> could result in an effective system of financial responsibility to reduce and respond to environmental harm.

With respect to financing claims for urban rights, an obvious candidate would be to focus on value capture principles.<sup>206</sup> These take different forms, such as tax increment financing and similar techniques that seek to recoup the costs of development.<sup>207</sup> Whatever the selected mechanism, the application of a value capture principle could, like the environmental mechanisms discussed above, implement a financing mechanism that is equitable in its aim, redistributing the costs of environmental harm and urban growth alike to those who would otherwise benefit from reduced enforcement. For example, a tender for the expansion of a metro system could require that the developers remit to the relevant governmental unit a percentage of revenue reflecting the benefit of the development to the entire area served by the metro system, and not merely the places that benefit economically from the location of stations.<sup>208</sup> Where this is not required by law, the

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chemical-and-cleanup-enforcement (last visited Mar. 24, 2018).

<sup>205</sup> These principles have been internationally agreed to in documents like the 1972 Rio Declaration on Environment and Development. *See* U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. I), P 15–16 (Aug. 12, 1992). On the increasing relevance of these principles in practice, see, for example, Travis Miller, *The Evolving Regulations and Liabilities Entwined in Corporate Social Responsibility*, 46 TEX. ENVTL. L.J. 219 n.47, 49 (2017).

<sup>206</sup> This is not by any means a new idea. *See, e.g.*, Nancy J. Hoffmeier Zamora, *New Financing Strategy for Rapid Transit: Model Legislation Authorizing the Use of Benefit Assessments to Fund the Los Angeles Metro Rail*, 35 UCLA L. REV. 519, 519–20 (1988) (“[T]he term ‘value capture’ has become a common phrase among legislators and administrators responsible for funding major capital improvements such as rapid transit projects.”). Nor is it mere hyperbole: “‘About six months ago,’ Judge [Ricard] Posner [the noted conservative jurist] said, ‘I awoke from a slumber of 35 years.’ He had suddenly realized, he said, that people without lawyers are mistreated by the legal system, and he wanted to do something about it.” Adam Liptak, *An Exit Interview with Ricard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html>.

<sup>207</sup> *See, e.g.*, John West and Michael Gruen, *A Better Path for East Midtown*, 23 CITY L. 25 (2017) (arguing for tax increment financing instead of more traditional zoning techniques to recover some financial benefits from development in New York City).

<sup>208</sup> This notion is referred to as “value capture,” whereby an entity retains “some percentage of the value provided in every transaction,” making the offer less attractive. Josh Kaufman, *What is ‘Value Capture’?*, THE PERSONAL MBA, <https://personalmba.com/value-capture/> (last visited Aug. 28, 2018). Value capture is especially contentious in the transit arena, because developers and

recognition of this principle would permit more aware and involved citizens to assert claims for value capture distribution. In this way, the value capture principle—again like the environmental financing principles suggested above—would also serve to promote collective and diffuse interests.

#### CONCLUSION

Of course, while the enforcement mechanisms may be tried, true, and effective, changing norms requires more than enforcement. Normative shifts require a high degree of social consensus on the need to make such a change. On the one hand, that need may seem obvious enough: it is neither in the interest of the broader society to tolerate the physical, environmental, and emotional poverty of its population in the short- or the long-term. On the other hand, however, many societies continue to do so and a global consensus to reduce poverty is not the rallying cry of our time. Sadly, it may take a series of urban and environmental crises triggered by widespread living conditions that are both unhealthy and oppressive. In the meantime, however, focused efforts to take measures like advocating loosened standing requirements and augmenting urban and environmental education and participation may go a long way to helping create more widespread access to justice.

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speculators benefit from a system's expansion. For an example of how value capture has gained currency in the public transportation arena, see PUB. TRANSP. ADMIN., *Value Capture*, <https://www.transit.dot.gov/valuecapture> (last visited Aug. 28, 2018).