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Rethinking Access to Justice: A Conflict Resolution Approach in a World of Fewer Trials

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INTRODUCTION

The search for access to justice for disempowered populations, in terms of gender, class, race or ethnicity, is central to many legal systems to help enable litigants to claim their rights under the institutions of the state; over time it has carried different meanings and implications.[1] This Article proposes a novel approach to access to justice by introducing a complex multilevel model to address the various stages of the development of legal conflicts in an age of vanishing trials.[2] It provides a nuanced understanding of various modes of access to justice that correspond

[1] Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 182 (1978) [hereinafter Cappelletti & Garth, *The Newest Wave*] (pointing to the notion that "[t]he words 'access to justice' are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system — the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state.").

[2] Since WWII, we have seen a decline in civil trials, as well as settlements and plea bargains far outnumbering fully written and final verdicts despite the rise in case filings. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*,

to various needs of disempowered citizens before they enter the legal system and as they make their long journey within it. Parties trying to resolve disputes through the civil justice system nowadays end up drifting through an incoherent, inconsistent, and opaque process generally resulting in some form of reluctant compromise.[3] During this procedure, reliable data regarding expected case disposition and outcome (on the basis of similar cases) is not made available to the parties. No systematic screening mechanism directs parties to holistic conflict resolution alternatives. Accordingly, many people who initiate lawsuits normally find themselves within an adversarial and incoherent negotiation process in the shadow of the courts.[4] This problem is particularly true for unrepresented litigants, a growing population that seeks access to justice in contemporary court systems.[5] It is also true for conflicts that never reach the court or go through any other legal procedure due to barriers of costliness and lack of access to legal information.[6]

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1 J. EMPIRICAL LEGAL STUD. 459, 461–64 (2004) [hereinafter Galanter, *The Vanishing Trial*]; *see also infra* Section IV.

[3] *See generally* Ayelet Sela et al., *Judges as Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observations of Judicial Settlement Practices*, 24 HARV. NEGOT. L. REV. 83 (2018).

[4] Peter S. Adler, *Is ADR a Social Movement?*, 3 NEGOT. J. 59, 61–62 (1987) (discussing the consequences of a delayed and inefficient justice system).

[5] Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 649 (2017).

[6] *See generally* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) [hereinafter Galanter, *Why the Haves Come out*

To address the question of access to justice in an age of vanishing trials, this Article develops an interdisciplinary multilevel model in light of the failure of ADR to become the prevailing paradigm for resolving conflicts against the backdrop of the decline of litigation. The model integrates theoretical insights from the ADR movement with methodology from law and society scholarship. This model addresses ways for improving access to justice during each stage of civil conflict, focusing specifically on the pretrial stage and settlement hearings, which today is the main public sphere for parties seeking justice. Our findings, based on comparative legal study as well as comparative court observations and interviews with judges, suggest that there are different models of framing access to justice in a world of vanishing trials. This Article proposes expanding the horizons of access to justice by adopting a modular multilevel model to enhance conflict resolution awareness. Further, this Article focuses on developing a judicial conflict resolution perspective for the stage of the preliminary hearing — a stage at which most civil cases settle today.

Part I of this Article provides an overview of the debate on access to justice in legal scholarship, outlining the differences between three perspectives on conflicts that were developed in the 1970s, and discussing contemporary challenges to access to justice in an age of vanishing trials. Part II presents our multilevel model of the development of the civil conflict. Using this model, which offers a broad perspective of conflict resolution, we discuss possible developments of the principle of access to justice based on a broad perspective of conflict resolution. Part III focuses on two specific stages of a civil legal conflict: the pretrial stage and

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Ahead] (outlining the barriers facing parties preventing them from litigating, among them high costs, lack of information, and know-how of the justice system).

use of ADR during the trial itself. It provides examples from the Israeli justice system, which is particularly pertinent for understanding the effect of vanishing trials on access to judicial discretion, as judges are granted inquisitorial powers that allow them an informal space for judicial conflict resolution activities. We add actual impressions, interviews, and findings from the ground to these examples. Furthermore, this Part reveals findings regarding perceptions of judges on their role in promoting access to justice within a settlement culture. Part IV presents an ideal model of access to justice, developed in Quebec, which is based on a conflict resolution perspective instead of adjudication and litigation as the main forms of justice. Lastly, the conclusion analyzes these findings and offers to implement our multilevel model in order to develop our access to justice perspective in an age of conflict resolution and vanishing trials.

I. Access to Justice and Vanishing Trials

A. The Background of Access to Justice

The concept of access to justice, which originated in the 18th century, at first centered around a narrow understanding of the "formal" right to self-representation, namely, the right to litigate and defend one's claim in court.[7] This right was perceived as fundamental, with no need for state affirmation. At the time, the state was not responsible for assisting those who could not afford proper legal help, and justice could be attained only by those who had adequate means.[8]

[7] Cappelletti & Garth, *The Newest Wave*, *supra* note 3, at 183 ("A right of access to judicial protection meant essentially the aggrieved individual's *formal* right to litigate or defend a claim.") (emphasis in original)).

[8] *See* Mauro Cappelletti et al., *Access to Justice: Comparative General Report*, Articles by Maurer Faculty 669, 674–75 (1976) [hereinafter Cappelletti et al., *Comparative General*

In the mid-20th century, the access to justice movement evolved from a formal rights-centered approach to one focusing on the obligation of the state to provide an affordable, effective justice system accessible to all, including "ordinary people."[9] There was a widespread movement demanding rights for disempowered individuals and communities. This was done by helping people gain access to fair representation in the courts, lowering legal costs, and reducing

Report] (underscoring the need to be able to afford costs of the "winner-takes-all" systems, where the loser pays for the winner's expenses (as takes place in the UK) and the high cost of attorneys' fees). *See generally id.* at 671 (noting that "while access to the law, and more particularly, access to justice may have a been 'natural right,' natural rights did not require affirmative state action for their protection. . . . The state thus remained passive with respect to such problems as the ability . . . of a party to recognize his legal rights and to defend them adequately."); Mauro Cappelletti, *Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and School Trends*, 25 STAN. L. REV. 651 (1973).

[9] Cappelletti & Garth, *The Newest Wave*, *supra* note 3, at 238–39 ("[T]he effort to create more egalitarian, just societies has focused attention on ordinary people — those traditionally isolated and powerless in their dealings with strong organizations and governmental bureaucracies. Our modern societies, as we have noted, have in recent years gone some distance toward providing more substantive rights to the relatively weak.").

delays and the complexity of the justice systems.[10] These new rights enable state-sponsored legal aid and law clinics to provide free legal representation for disadvantaged populations.[11]

Moving forward, access to justice focused on procedural justice and the rights of litigants. In addition, it highlighted barriers in legal procedures including costly litigation — either direct expenses for legal counsel or other expenses associated with high-risk legal systems that operated under the "winner takes all" scheme by which the losing party paid the expenses of the winners[12] — and lengthy proceedings, since "late justice is bad justice."[13] Parties' inability to fairly litigate and their strategic disadvantages compared to their adversaries were also considered a significant barrier to access to justice.[14] For instance, self-representation due to a

[10] Cappelletti et al., *Comparative General Report*, *supra* note 10, at 672 ("The right of effective access to justice has emerged with the new social rights" which meant that "*affirmative* action by the state is necessary to ensure the enjoyment of these social rights." (emphasis in original)).

[11] *See generally id.* (covering the evolution of access to justice and its various types).

[12] Such is the case in the British legal system. *See* The Civil Procedure Rules 1998, SI 1998/3132, Part 36 (Eng.).

[13] Cappelletti et al., *Comparative General Report*, *supra* note 10, at 676 (explaining that "court delay . . . can effectively cause a denial of justice.").

[14] Marc Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347, 347 (1975) (noting that such advantages or hindrances to fair litigation may include "ability to structure the transaction; expertise, economies of scale, low start-up costs; informal relations with institutional incumbents; bargaining credibility; ability to adopt optimal strategies; ability to play for rules in

lack of financial resources came under the umbrella of barriers to access to justice.[15] Another obstacle to access to justice particularly pertinent for disempowered and disadvantaged litigants was legal literacy, namely, the legal knowledge needed to recognize enforceable legal rights.[16] Recently, the "erosion of meaningful consent"[17] has also been articulated as a significant barrier in light of mandatory legal mechanisms such as mediation and arbitration to which litigants are referred. Other factors that deprive access to justice include "one shot" litigants, who have the lower hand against "repeat player" litigants, with the latter enjoying various advantages such as litigation experience, knowledge of the law, or informal networks with decision makers.[18]

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both political forums and in litigation itself by litigation strategy and settlement policy; and ability to invest to secure penetration of favorable rules").

[15] *See generally* RABEEA ASSY, INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION (2015).

[16] *See generally* BRIAN ABEL-SMITH ET AL., LEGAL PROBLEMS AND THE CITIZEN: A STUDY IN THREE LONDON BOROUGHS (1973).

[17] Jacqueline Nolan-Haley, *Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent?*, 33 OHIO ST. J. ON DISP. RESOL. 373, 391 (2018) [hereinafter Nolan-Haley, *ADR's Access to Justice*] (explaining that informed consent is "an ethical, moral, and legal concept" that "must be based on relevant information and be voluntary. Informed consent is a foundational principle that promotes human dignity, advances autonomy, and enhances party self-determination").

[18] Galanter, *Why the Haves Come out Ahead*, *supra* note 8, at 98–101.

The importance of the broader principle of access to justice was recognized in different places around the world, and the idea was implemented through various experimentations. One of the most significant was the Florence Project, a four-year comparative project led by Italian jurist Mauro Cappelletti in Florence, Italy in the 1970s. Cappelletti analyzed comparative global data, and the interdisciplinary Florence Project charted the historical evolution of access to justice and the legal mechanisms developed to implement it around the world, emphasizing its importance beyond both legal representation and the justice-seeking arenas of the courts.[19] Cappelletti further described the development of access to justice as related to a set of institutional reforms and the development of the welfare state, which strived to provide effective access to justice to the population.[20] The first wave manifested in the rise of the 1965 Office of Economic Opportunity's neighborhood reform program, which aimed to bring legal services to the poor.[21] The second wave extended the notion of representation of the "diffused interests" of

[19] *See generally* Cappelletti & Garth, *The Newest Wave*, *supra* note 3. The Florence Project was a four-year comparative research project lead by Professor Mauro Cappelletti, a law professor at Stanford University and the European University Institute at Florence, and the President of the Florence Center for Comparative Judicial Studies. The project was entitled "Florence Access-to-Justice Project" and was sponsored by the Ford Foundation. *See generally* Mauro Cappelletti, *Alternative Dispute Resolution Processes Within the Framework of the Worldwide Access to Justice Movement*, 56 MOD. L. REV. 282 (1993); Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice*," 35 CATH. U. L. REV. 1 (1985).

[20] Cappelletti et al., *Comparative General Report*, *supra* note 10, at 681–82.

[21] *Id.* at 683.

interest groups, such as consumer groups or environmental players, and led to the establishment of U.S.-based public interest law firms that were supported by foundations.[22] The third wave was a result of an institutional shift from institutions of legal representation to a focus on dispute processing.[23]

Current understanding of access to justice has come to conceptualize this principle as including both accessibility (access to courts that can offer litigants just results based on the law) and fairness in the legal process itself. In 2016, in an attempt to underscore the practical implications of these terms, a group of legal experts evaluated the effect of recent British legal reforms that were intended to enhance efficiency, introduce new technologies to modernize the justice system, make the legal process accessible to more users, and reduce costs on litigants' access to justice.[24] They set a four-component minimum standard: (1) "[a]ccess to the formal legal system,"[25] which must be "practical and effective" and not "theoretical and illusory,"[26] with simple application processes and emphasis on including those who are "digitally excluded;"[27] (2) access to an effective hearing, which includes opportunities to participate, with neutral

[22] *Id.* at 693.

[23] *Id.* at 705. *See generally* Marc Galanter, *Justice in Many Rooms*, *in* ACCESS TO JUSTICE AND THE WELFARE STATE 147 (Mauro Cappelletti, ed., 1981).

[24] NATALIE BYROM, DEVELOPING THE DETAIL: EVALUATING THE IMPACT OF COURT REFORM IN ENGLAND AND WALES ON ACCESS TO JUSTICE 4 (2019).

[25] *Id.* at 5.

[26] *Id.* at 16.

[27] *Id.*

authorities who are trusted and treat litigants with dignity.[28] It additionally includes representation if the case "is too factually or legally complex"[29] for a legally illiterate litigant to understand, and when there is no representation, the "individual [must be] able to put his or her case effectively."[30] This component includes effective participation, which means that litigants — and especially disempowered ones — must not be exploited, as research has indicated that they are "more likely to accept as legitimate processes that they perceive as procedurally just, regardless of whether these processes comply with the law."[31] (3) Access to a decision in accordance with substantive law, which entails access to courts in which the "disputes can be determined in accordance with the rights prescribed by the legislature;"[32] and lastly, (4) access to remedy, which is not "futile or irrational to bring to claim."[33] The four components should be "interrelated, mutually supportive and non-divisible."[34]

Placing the access to justice debate within the context of current technological developments, the experts further discussed the structural implications of online dispute resolution ("ODR"), stating that access to justice must include the following: reduction in cost to

[28] *Id.* at 19.

[29] *Id.*; Abi Adams & Jeremia Prassl, *Access to Justice, Systemic Unfairness and Futility: A Framework* [Forthcoming].

[30] BYROM, *supra* note 26, at 18.

[31] *Id.* at 21.

[32] *Id.* at 25.

[33] *Id.* at 26 (quoting R(UNISON) v. Lord Chancellor [2017] UKSC 51 [96] (Eng.)).

[34] Cappelletti et al., *supra* note 25, at 26.

the litigant and the system, reduction in time to reach a resolution, reduction in the need to carry out hearings, increase in the rate of settlement, increase in the volume and the litigants' engagement, and the need to create subjective measures for "procedural justice and need satisfaction."[35]

Aside from various global manifestations of the access to justice movement, like those discussed above, its rise in the 1970s was accompanied by two other significant movements that also aspired to seek justice beyond the courtrooms and beyond representation: the ADR movement and the socio-legal studies-based dispute perspective.

i. The ADR Movement

The ADR movement sought, among other goals, to help disempowered communities by narrowing the power imbalance between litigants.[36] Its members created mediation centers in

[35] *Id.* at 7.

[36] The aspiration for social justice and for empowering the poor was one of the stories promoted by the ADR movement; among them was also "the "satisfaction story," which was much more dominant than the transformative story. Other stories were the oppression story and the transformative one. *See generally* JOSEPH P. FOLGER & ROBERT A. BARUCH, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (Jeffrey Z. Rubin ed., 2014); CARRIE MENKEL-MEADOW, MEDIATION AND ITS APPLICATION FOR GOOD DECISION MAKING AND DISPUTE RESOLUTION (2016).

poor neighborhoods[37] and sought to address the lack of efficiency in the courts by providing alternative dispute resolution methods to resolve conflicts in the courtroom.[38]

The movement was committed to community solidarity.[39] By including the narratives of the litigants themselves, it introduced new points of view into the courtroom and, consequently,

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[37] Adler, *supra* note 6, at 61–62 (providing historical background of neighborhood justice centers).

[38] Richard Delgado, *Alternative Dispute Resolution: A Critical Reconsideration*, 70 SMU L. REV. 595, 595–96 (2017). The ADR movement, which started in the 1970s as a law reform movement in the United States, was first perceived as an alternative to court adjudication, which was considered expensive, anxiety-inducing and time consuming. Mediators who used simple, accessible language replaced judges and legal jargon. The ADR movement was an expression of anti-lawyer, anti-adversary justice. *Id*.; Adler, *supra* note 6, at 63. The movement, which included the processes of mediation, arbitration, negotiation and consensus building, embraced "the notions of empowerment and voluntarism, the idea that disputants themselves can be the architects of their own futures." The goals of the movement are "reforming the economic and organizational inefficiencies of large bureaucracies; strengthening local communities; increasing public accessibility to dispute resolution forums; demystifying the justice process; and freeing disputants from the excesses of some over-priced professionals." *Id.* at 64.

[39] *See* Nolan-Haley, *ADR's Access to Justice*, *supra* note 19, at 375 (arguing that the ADR movement would allow communities "to create their own mosaic of justice, personalized and individualized justice"); *see also* Michal Alberstein, *Using ADR to Promote Traditional Justice and the Rule of Law*, 16 DISP. RESOL. MAG. 25, 28 (2010) (maintaining that in cases of

enhanced rights for disempowered groups.[40] In addition, the option of mediation promised specifically crafted justice, focusing on solutions to the particular legal problem rather than classifying the conflict into pre-existing, supposedly objective, and seemingly universal categories. In mediation, the opposing sides of the conflict had significant agency. The structure of the mediation process broke down the hierarchies that existed in the courtroom, and as the conversation took place on an eye-to-eye level, each side trusted the other. Furthermore, the

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transitional justice that used ADR techniques, community courts where the judges are elected by their peers "helped to overcome the dysfunctional judicial system" and "are an expression of local community work that empowers the population and especially victims"). *See generally* Adler, *supra* note 6, at 62 (asserting that the ADR movement brought mediation to communities and fostered community solidarity through grassroots activity that aimed at "rebuilding the American justice system from the ground up"); Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425 (2001).

[40] *See* Delgado, *supra* note 40, at 597 (underscoring the reasons mediation gave disputants an empowering experience: "The comfortable setting and informal atmosphere instead provide an ideal situation for a more empowered actor to behave in his usual confident fashion and to expect the mediator to enact his wishes as well."). *See generally* Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984).

sides themselves were the ones creating the norms relevant to their particular dispute, and thus, the movement provided a sense of justice and personal empowerment.[41]

While the ADR movement was first welcomed for its promise to help disempowered communities, it was later criticized for doing just the opposite when it convinced disempowered litigants to give up their rights in exchange for voicing their complaints.[42] As such, it produced systemic pressures that caused weaker sides to settle even when settling was against their interests.[43] The movement was further denounced for promoting "lean" procedural justice and for ignoring factors, such as class, that cause social stratification and reify existing power relations.[44] The movement was also criticized for not promoting "thick" justice that addressed

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[41] *See generally* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

[42] Nolan-Haley, *ADR's Access to Justice*, *supra* note 19, at 386–88.

[43] *Id.* at 385; n.72. *See generally* Julie Macfarlane, *Culture Change?: A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241 (2002) (discussing features of mandatory mediation programs in two Canadian cities, Toronto and Ottawa); Vicki Waye, *Mandatory Mediation in Australia's Civil Justice System*, 45 COMM. L. WORLD REV. 214 (2016) (speaking critically of mandatory mediation developments in Australia).

[44] Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 24–26 (2012); *see* Richard L. Abel, *The Contradictions of Informal Justice*, *in* 1 THE POLITICS OF INFORMAL JUSTICE 287 (Richard L. Abel ed., 1982); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1994) [hereinafter

the place of the individual within social and economic structures and did not protect minorities.[45] Under this view, the focus on alternative dispute resolution methods seemed to come at the expense of structural reforms. Thus, the ADR movement was accused of refraining from promoting social awareness of inequality and of repressing disempowered communities through privatization and soft practices.[46]

The lack of legal verdicts resulting from the use of mediation prevented the creation of a symbolic horizon that could delineate norms and values. Ending legal cases with settlements rather than adjudicated decisions impeded the creation of public values. For instance, fewer legal precedents were created to provide guidance when laws could not do so.[47] Adjudicated decisions delineate a common legal normative standard that "defin[ed] a society and gave it its identity and inner coherence"[48] while stipulating what is "true, right and just."[49] The courts that

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Delgado et al., *Fairness and Formality*]; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1547–51 (1991).

[45] *See generally* LAW IN EVERYDAY LIFE (Austin Sarat & Thomas R. Kearns eds., 1995).

[46] Adler, *supra* note 6, at 67.

[47] Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1086 (1984) [hereinafter Fiss, *Against Settlement*]; *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (setting the important precedent that abolished segregation in public schools).

[48] Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 128 (1982) [hereinafter Fiss, *The Social and Political Foundations of Adjudication*].

[49] Boaventura de Sousa Santos, *Law and Revolution in Portugal: The Experiences of Popular Justice After the 25th of April 1974*, *in* 2 THE POLITICS OF INFORMAL JUSTICE 251 (Richard L.

represented the state, as Professor Owen Fiss asserted when discussing the public function of the law, are mandated to enforce these moral ideas as part of maintaining social cohesion.[50] If legal disputes are resolved according to individual preferences rather than in accordance with state law, the law as a public good will be replaced by "individual interests or at best individual morality."[51] Therefore, the ADR movement was charged with curtailing the promotion of the public values, one of the most essential functions of judicial adjudication.[52] While some purported that the ADR movement was offering privatized justice,[53] others were less adamant in

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Abel ed., 1982) (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977)); Ronald Dworkin, *No Right Answer?*, *in* LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOR OF H. L. A. HART 58 (P. M. S. Hacker & J. Raz eds., 1977).

[50] Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 50, at 121–22.

[51] *Id*. at 128.

[52] Judith Resnik, *Whither and Whether Adjudication*, 86 B.U. L. REV. 1101, 1154 (2006).

[53] *See generally* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 892 (1991); Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145 (1988); Delgado et al., *Fairness and Formality*, *supra* note 46, at 1404; Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 677 (1986); Michele G. Hermann, *The Dangers of ADR: A Three-Tiered System of Justice*, 3 J. CONTEMP. LEGAL ISSUES 117 (1989-1990); David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397, 414 (1985); Carrie Menkel-

their critique, asserting that using ADR in the courtroom could generate the necessary public values "but only if they are crafted with this end in mind — and only if we are prepared to oppose settlements that defeat these values."[54] Lastly, the question of the litigant's consent was also raised. Fiss contended that "[c]onsent is often coerced."[55] Cappelletti also expressed concerns regarding "second-hand justice" due to a lack of procedural fairness perpetuated by the abuse of stronger litigants with unequal bargaining power.[56] Lack of meaningful consent, then, impairs the fairness of ADR processes, because parties fail to know what they are agreeing and

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Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 1–2 (1991); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 483–84 (1987); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1987); Grillo, *supra* note 46, at n.19.

[54] David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620 (1995). Settlements are done in secret, and thus "award[] officials the discretion to keep secrets or grant confidentiality is itself a policy that should be able to withstand public scrutiny." *Id.* at 2648. As such, they might conceal "important health and safety information from the public" and infringe on public values. *Id.* at 2650.

[55] Fiss, *Against Settlement*, *supra* note 49, at 1075.

[56] Cappelletti, *Alternative Dispute Resolution Processes*, *supra* note 21, at 290.

committing to, nor understand what the possible outcomes of the process are.[57] Consequently, the absence of consent infringes on litigants' access to justice.[58]

ii. The Dispute Perspective

The dispute perspective is the third theoretical trope we use in our analysis of the access to justice framework and the ADR movement. While the access to justice framework focused on the trial and litigation, assuming a verdict, the ADR movement suggested alternatives to classic dispute systems. The dispute perspective, on which we expand below, highlighted the pre-court arena — that is, disputes that have not yet reached court — and as such, complements the two others.

Legal conflicts begin long before they enter court.[59] The perception that social disputes are legal ones is shaped by social constructs of legal rights and entitlements. This shifts the focus from analysis of disputes in the courts, to an analysis of the different stages disputes undergo in their development from an embryonic stage to the trial stage.[60] According to this view, legal cases reaching court are only a small, non-representative sample of the many conflicts existing in society. Many people are not conscious of their legal rights and the infringement of such rights, and even when they have some awareness, they fail to pursue the

[57] Nolan-Haley, *ADR's Access to Justice*, *supra* note 19, at 392.

[58] Cappelletti, *Alternative Dispute Resolution Processes*, *supra* note 21, at 294–95.

[59] *See generally* William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 LAW & SOC'Y REV. 631, 633–38 (1980).

[60] *Id.*

fulfillment of their rights.[61] When attempting to seek remedies, they give up after encountering various economic and institutional barriers. Later, when potential litigants do meet a lawyer or enter the court system, their perceptions and motivations change, and they may withdraw or modify their claims when encountering the laws relevant to their dispute, finding new information, or after realizing the high costs they may incur during the legal process.[62] This perspective of a dispute as a social construct, guided law and society scholars William L. F. Felstiner, Austin Sarat, and Richard L. Abel who studied civil conflicts in the 1980s.[63] According to their view, focusing on the late stage of disputes that materialize and reach the court, as the ADR movement suggested, while ignoring the many stages of dispute development, resulted in a limited perspective on dispute processing in society.[64]

We supplement their analysis with a broad understanding of conflict resolution and prevention. Assuming that conflicts are an important positive source of friction and learning, we propose to study the dispute perspective through a Dispute Systems Design ("DSD"), articulated by legal scholars Ury, Brett, and Goldberg in the late 1980s.[65] DSD focuses on "internal

[61] *Id*. at 636.

[62] *Id*. at 642 ("A party may change his objectives in two ways: what he seeks or is willing to concede and how much. Stakes go up or down as new information becomes available, a party's needs change, rules are adjusted, and costs are incurred.").

[63] *Id*. at 631–32.

[64] *Id*. at 632.

[65] *See generally* WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988).

organizational processes that have been adopted to prevent, manage or resolve a stream of disputes connected to an organization or institution."[66] Such mechanisms may include binding arbitration or other multi-option ADR processes that are either interest-based or rights-based processes,[67] confidential voluntary participation assisted by neutral third parties,[68] and the system's transparency and accountability.[69] In keeping with this framework, we consider addressing disputes to be inherent to any organization and a source of learning and growth that requires collaborative planning, and a gradual system of interest-based assisted negotiation, mediation, and information regarding legal rights. This framework is particularly important to understand the new legal mechanisms developed in place of adjudicated verdicts,[70] as we discuss in the next section addressing vanishing trials.

iii. Vanishing Trials

The need to develop a systematic approach to legal disputes intensifies when considering that we are currently in the era of the vanishing trial, wherein despite the rise in the number of

[66] Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009). *See generally* NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES (2d ed. 2013).

[67] SOC'Y OF PROFS. IN DISP. RESOL., DESIGNING INTEGRATED CONFLICT MANAGEMENT SYSTEMS — GUIDELINES FOR PRACTITIONERS AND DECISIONMAKERS IN ORGANIZATIONS 7–14 (2001), http://digitalcommons.ilr.cornell.edu/icr/2 [https://perma.cc/RH29-EF3U].

[68] *Id*. at 15.

[69] URY ET AL., *supra* note 67, at 61–62.

[70] *See generally* Sela et al., *supra* note 5.

case filings, settlements and plea bargains far exceed fully written and final verdicts. [71] The decline in civil trials traces back to the end of World War II, and its origins have been attributed to the enormous caseload faced by the courts, and the need to use judicial time efficiently.[72] The United States, for example, has seen a steady decrease in civil trials over the past 40 years, with the number of federal civil cases resolved by trials dropping to a mere 1.8%.[73] Other countries such as England, Canada, and Israel have shown similar trends.[74]

The concept of vanishing trials does not mean that trials do not take place, but rather that resolution of legal cases typically takes place in the pretrial stage, such as when judges settle the cases themselves or send them to be resolved in out-of-court mediation or arbitration proceedings.[75] Direct judicial activity prompts the early termination of legal cases by persuading

[71] *See generally* Galanter, *The Vanishing Trial*, *supra* note 4.

[72] Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1269 (2005).

[73] Galanter, *The Vanishing Trial*, *supra* note 4, at 461.

[74] *See generally* Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. EMPIRICAL LEGAL STUD. 735 (2004) (discussing the phenomena in England in Canada); Ayelet Sela & Limor Gabav-Egozi, *The Role of Judges in Adjudication, Settlement and other Vanished Trials: Evidence from Civil Trial Courts* (2017) (discussing the phenomenon in Israel).

[75] *See* Shari Seidman Diamond & Jessica Bina, *Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637, 654–56 (2004).

litigating sides to settle, thus creating a "settlement culture."[76] This shift has led to a change in judges' roles from one of adjudication to case management, which means extensive judicial involvement aimed at accelerating resolutions and convincing litigants to settle rather than trying their cases in court.[77]

The phenomenon has received considerable scholarly attention, in an effort to characterize it and underscore its implications. Marc Galanter named this particular judicial activity "litigotiation," defining it as "strategic pursuit of a settlement through mobilizing the court process."[78] Judith Resnik asserted that while at first judicial management comprised a host of techniques aimed at narrowing the issues at hand to those solely relevant to the trial, it later evolved into a settlement-inducing dispute resolution method due to the incentives created by the rules of civil procedure.[79] One of the authors of this Article has further shown the various roles

[76] *See* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 410–11 (2004).

[77] Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982).

[78] Marc Galanter, *World of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

[79] Resnik, *supra* note 79, at 378–80 (explaining that discovery rules in the 1938 Federal Rule of Civil Procedure have generated the need of pre-trials, in which judges became "mediators, negotiators, and planners — as well as adjudicators." Later, judges were encouraged to use "informal dispute resolution and . . . case management" to deal with their extensive case load); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308 (1986).

judges play, asserting that "judges are often parties to the negotiation as to whether to adjudicate the legal conflict, third parties in an effort to mediate it, arbitrators as to guiding rules of compromise, and facilitators of dialogue, problem solvers and dispute designers."[80]

In practice, the phenomenon of the vanishing trial affects the ability of litigants to access justice, and it has an especially significant impact on disempowered litigants. First, extensive use of ADR in the courts by judges, as well as the use of mandatory and quasi-mandatory mediation (depending on the discretion of the judge, or on the civil procedure) programs as an acceptable form of conflict resolution has altered the nature of consent.[81] In a recent study,

[80] Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice*, 16 CARDOZO J. CONFLICT RESOL. 879, 879 (2015); Sela et al., *supra* note 5, at 92.

[81] Nolan-Haley, *ADR's Access to Justice*, *supra* note 19, at 385, n.71 ("In the case of England, as a result of amendments to the Civil Procedure Rule, courts have the discretion to impose costs on a party who unreasonably refuses to mediate. Some scholars have argued that this creates a situation in which parties are deprived of any choice. . . . More recently, the Civil Justice Working Council on ADR issued an interim report indicating that the group was considering whether to mandate the use of ADR processes."). *See also* CJC Interim Report, *supra* note 69, at 45–50; Giuseppe De Palo & Dr. Leonardo D'Urso, *Achieving a Balanced Relationship Between Mediation and Judicial Proceedings*, *in* EUROPEAN PARLIAMENT, THE IMPLEMENTATION OF THE MEDIATION DIRECTIVE 12–13 (2016), https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/balanced-relationship-mediation.pdf [https://perma.cc/5HP9-BCU7] (discussing the various incentives and sanctions employed in EU countries); Jacqueline M.

Jacqueline Nolan-Haley expanded upon the effects of ADR on the erosion of the litigants' ability to consent.[82] She asserted that pressure on litigants to take part in procedures, such as court-mandated mediation and arbitration that come in place of an adjudicated decision, has affected their ability to express informed consent for these processes.[83] Furthermore, these recent trends have eroded litigants' "informed consent," which is a "foundational principle that promotes human dignity, advances autonomy . . . [and] depends on context."[84] Accordingly, the noted erosion of informed consent poses an "assault on human dignity."[85] The erosion of consent further affects litigants' access to justice due to the infringement of the parties' autonomy within the mediation and arbitration processes.[86] The diminished or eliminated consent, she says, raises policy questions relating to fairness, substantive and procedural justice, and the adequacy and legitimacy of mandatory mediation.[87] The notion of consent becomes even more problematic

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Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C.J. INT'L L. & COM. REG. 981, 998–99 (2012) (discussing Europe's turn towards compulsory mediation).

[82] Nolan-Haley, *ADR's Access to Justice*, *supra* note 19, at 384–85.

[83] *Id*. at 385–86.

[84] *Id.* at 391.

[85] *Id.* at 377.

[86] Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 560–64 (2008).

[87] Nolan-Haley, *ADR's Access to Justice*, *supra* note 19, at 377–78.

when self-represented parties enter into agreements offered by judges or mediators without being fully aware of their legal rights, thus agreeing to unjust results.[88] Lastly, Professor Nolan-Haley contends that the proper dispute resolution process allows parties to realize self-determination and provides them with relatively equal bargaining power.[89]

C. The Multilevel Model of The Development Of Disputes and Access to Justice

Building on these three frameworks, access to justice, ADR and the dispute systems design perspective, with the aim of addressing their shortcomings, this Article argues that access to justice concerns should transcend the common focus on litigation. In what follows, this Article proposes a model that ensures access to justice, particularly to disempowered litigants, throughout the stages of a conflict.

This model integrates a Dispute System Design perspective with an institutionalized ADR framework, in reference to access to justice. The following table outlines the stages that a conflict undergoes, from the "embryonic" stage of conflict, when one does not even realize that

[88] *Id.* at 387, n.84; Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 Wash. U.L. Q. 47, 96 (1996); *accord* Amy G. Applegate & Connie J.A. Beck, *Self-Represented Parties in Mediation: Fifty Years Later It Remains the Elephant in the Room*, 51 Fam. Ct. Rev. 87, 97 (2013) (proposing special guidelines for mediators who work with self-represented parties); Robert Rubinson, *Indigency, Secrecy, and Questions of Quality: Minimizing the Risk of "Bad" Mediation for Low-Income Litigants*, 100 Marq. L. Rev. 1353, 1354 (2017) (noting that the risk of poor mediation by unskilled mediators intensifies when there are large numbers of low-income litigants who participate in court-annexed mediation programs).

[89] Nolan-Haley, *ADR's Access to Justice*, *supra* note 19, at 387.

an experience is injurious, through its path in court, until its finalization and execution. In each stage, the table emphasizes what is needed to ensure access to justice for disempowered communities.

Stage of Legal Conflict	**Access to Justice Needs and Challenges**
UnPerceived Injurious Experience (unPIE)	Rights awareness, legal education
Early Stages of Naming and Blaming	Legal knowledge, resources, increased awareness
Entrance to Court — Institutional Management	Information to "one shotters,"[90] measuring implications on disempowered litigants. Legal aid or clinics
Court-Annexed ADR	Skillful in-house facilitators, resolving disputes in the "shadow of the law"[91]
Pretrial Hearings	Use of judicial intervention techniques to close gaps
Trial Stage	Ensuring judicial awareness of disempowerment
Verdict	Setting norms to protect disempowered parties
Execution of the Verdict	Ensuring that rights have indeed been implemented in action and not only in books or in the verdict.
Avoiding similar conflicts and implementing the norm	Altering the conditions which brought the specific conflict including reference to other potential similar conflicts

[90] Galanter, *Why the Haves Come out Ahead*, *supra* note 8, at 97 (defining "one shotters" to mean "claimants who have only occasional recourse to the courts.").

[91] The expression is taken from Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

i. The UNPIE Stage:

Most of the disputes relevant for an "access to justice" perspective are actually at the bottom of the dispute pyramid.[92] Unperceived injurious experience ("unPIE") is a stage in which beholders have no awareness of the legal conflict. Many disputes are unPIE since people do not know their legal rights or fail to notice situations in which others abused them because either a lack of legal knowledge or because the injurious situation was purposely hidden from them.[93] It can be a situation of harassment, inequality, tort violation, or contract infringement. In contrast to the perspective that society is over-litigious and that there are too many conflicts, as claimed by ADR proponents, the unPIE perspective suggests that people tend to repress conflicts, with most people never reaching the surface of consciousness. Disempowered groups in society tend to remain in such a stage, and therefore, consciousness-raising and education as to their legal rights is the best way to increase their access to justice.

[92] Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 545 (1980) (explaining the dispute pyramid as follows: "We can visualize the process of dispute generation through the metaphor of a pyramid. . . . At the base are grievances, and the width of the pyramid shows the proportions that make the successive transitions to claims, disputes, lawyer use, and litigation.").

[93] Felstiner et al., *supra* note 61, at 633 (providing an example of a population living close to a nuclear test site, out of which some have developed cancer. In order for a dispute to develop they must learn that they are sick, be able to prove it is the fault of the test site and sue. Not all have the know-how to successfully go through the process and sue the plant).

ii. Early Stages of Naming and Blaming

Naming is the next stage in the development of disputes. This is when an individual both realizes and acknowledges that an experience has been injurious. Naming is a complex process that involves: "faulty recall, uncertain norms, conflicting objectives . . . and complex institutions."[94] As such, it is very different from the common understanding of legal disputes, where events are perceived as objective, who injured who is clear, and reality is stable and coherent. Here, only after processing the events do the injured individuals realize that they have been wronged. Since the process of naming is subjective and usually happens without contacting a lawyer or an opposing party, it depends on the harmed individual's legal literacy and awareness of rights. Disadvantaged groups many times lack such awareness.[95] Moreover, since disempowered people often suffer from systemic discrimination, they are much less likely to realize that a certain experience is injurious and that they are thus entitled to a remedy.[96] In order to promote access to justice at this stage, information and consultation on legal rights through legal clinics or the internet is required.

Blaming is the next step in the development of disputes. Once an individual or group have perceived an injurious experience, the experience transforms into a grievance.[97] The individual moves from a realization that the experience has been injurious into attribution of blame onto a specific individual or social entity. It relies on individuals' ability to both

[94] *Id.* at 638.

[95] *See id*. at 634–35.

[96] *See id.* at 635.

[97] *Id*.

recognize that they have been wronged and find the relevant mechanisms that will give them access to a remedy. This stage is also subjective as it reflects the perspective of the aggrieved, who perceives the injury as a remediable violation of norms.[98] As in previous stages, disempowered groups are particularly affected by the complexity and incoherence of the process.[99] Factors that may contribute to their vulnerability include the lack of knowledge of forms of dispute processing and legal remedies, lower level of education, and, perhaps critically, few personal or collective role models of successful disputes (i.e., lack of framing to place the responsibility on the side that inflicted the injury).[100] Often they have only a few, if any, examples around them of people who have managed to transform their experiences into grievances and then disputes.[101] Lastly, disempowered groups may lack social networks with representatives and officials to further their disputes once they are realized.[102] Social structures such as class, ethnicity, age, gender, and their intersections, amplify the vulnerability of

[98] *See id.* at 635, 641 (explaining the reason for this behavior: "Attribution theory asserts that the causes a person assigns for an injurious experience will be important determinants of the action he or she takes in response to it; those attributions will also presumably affect perception of the experience as injurious." (citation omitted)).

[99] *See id.* at 637.

[100] *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (a rare example of success in achieving equality for the African American community in the United States).

[101] *See* Felstiner et al., *supra* note 61, at 636–37.

[102] *See id.* at 644.

disadvantaged groups as well as the lack of awareness of their injuries.[103] Access to justice for disempowered groups at this stage takes place on two fronts. The first aims to increase awareness and bring legal knowledge of available remedies. Associations, unions, social workers, government representatives, and lawyers function as consciousness-raising agents that make disempowered litigants aware of their grievances and possible remedies.[104] The second allocates resources to assist disempowered groups to claim their rights via legal clinics and various NGOs, which will also raise awareness of injurious experiences that have been

[103] *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 150–51 (1989) (demonstrating how being both black and female resulted in unique structural discrimination that was different from race-based or gender-based discrimination; *see also* Pascoe Pleasence & Nigel J. Balmer, *Justice and the Capability to Function in Society*, DAEDALUS, J. AM. ACAD. ARTS & SCI., Winter 2019, at 140; Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. OF SOC. 339 (2008).

[104] Felstiner et al., *supra* note 61, at 645.

recognized as such.[105] The professional agents of dispute transformation additionally help groups and individuals realize their options.[106]

iii. Entrance to Court — Institutional Management

The next stage of legal conflict takes place when persons subjected to an injurious experience voice their grievance to a person or a body of authority, such as a landlord or the courts, in demand of a remedy from whom they are claiming their rights. When the grievance is rejected by a person or a body of authority, it is transformed into a *dispute* between the injured party and the other party.[107] According to the Dispute System Design perspective and the dispute pyramid, not all claims must end in court with a written judgment to be justly resolved.[108] For example, some needs are not economic. They might originate from a demand for a comprehensive policy change, validation of the injurious experience from the other side, and at times an apology might suffice to resolve an injurious experience.[109] Second, rules and laws are

[105] *See, e.g.*, THE ACTION GRP. ON ACCESS TO JUSTICE, LEGAL ORGANIZATIONS AND ACCESS TO JUSTICE ACTIVITIES IN ONTARIO (2014) https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/b/backgrounderonlegalorganizationsasofmay282014engfinal.pdf [https://perma.cc/P7AF-V39K].

[106] Felstiner et al., *supra* note 61, at 637.

[107] *Id.* at 635–36.

[108] Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 117–18 (2010).

[109] Such is the case of the CA (TA) Rabinowitz v. El Al, Tel Aviv Magistrate Court, 14588-03-16 (June 21, 2017) (Isr.), which is expanded on in section D of this Article.

also meant to create a normative horizon and do not need to be applied in every instance. When entering the institutional stage of the court, litigants who are "one shotters"[110] should receive information about the legal process, including the length and duration of each stage within the court system.

iv. Court-Annexed ADR

After a dispute is framed and a claim is submitted to the court, most legal systems today refer at least some cases to court-annexed ADR,[111] some form of assisted negotiation,[112] or various managerial or procedural tracks that encourage settlement and information exchange.[113] In certain jurisdictions, most of the cases settle at that stage before the parties even see a judge.[114] Many of these cases include fixed amounts of debt owed to banks, cellular companies,

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[110] Galanter, *Why the Haves Come out Ahead*, *supra* note 8, at 97 (elaborating on the scope of the term "one shotters").

[111] *See generally* Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993); Yedan Li, *From "Access to Justice" to "Barrier to Justice"? An Empirical Examination of Chinese Court-Annexed Mediation*, 3 ASIAN J.L. SOC'Y 377 (2016) (discussing court-annexed ADR in China).

[112] *See generally* Jean-Francois Roberge, *"Sense of Access to Justice" as a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada)*, 17 CARDOZO J. CONFLICT RESOL. 323 (2016).

[113] *See generally* Carpenter, *supra* note 7.

[114] *See generally* Sela & Egozi, *supra* note 76, at 11–12 (discussing pre-trial case terminations in Israel).

municipalities, and public institutions.[115] At this stage, concerns regarding access to justice include assistance in providing information for disempowered parties and caution regarding endorsement of debt claims without hearing the respondent position.[116]

v. Pretrial Hearings

The next stage in the evolution of a legal case is pretrial hearings, which take place unless parties reach a settlement or mediation agreement. In a large number of legal systems today, cases are disposed of during preliminary hearings such as pretrial settlement, judicial conciliation, cost hearings, summary trial, magistrate settlement hearing, or other institutionalized hybrids.[117] This stage includes an encounter with a presiding judge or another judicial figure.[118] In this stage, parties are actively encouraged to sort out their claims and counterclaims, gather information from each other, and pursue settlement in or out of the

[115] Yaniv Dori, Registrar, Bar Ilan University, Israel, Talk at Conference on Debts and Conflict Resolution (Feb. 2, 2019).

[116] *Id*.

[117] *See* Galanter, *The Vanishing Trial*, *supra* note 4, at 515–18. *See generally* Robert Dingwall & Emilie Cloatre, *Vanishing Trials?: An English Perspective*, 2006 J. DISP. RESOL. 51 (2006) (describing the English legal system); John Lande, *'The Vanishing Trial' Report*, 10 DISP. RESOL. MAG. 19 (2004) (detailing procedures in the U.S.); Sela & Egozi, *supra* note 76 (discussing Israeli conventions).

[118] Magistrates in the United States, for instance, facilitate settlement hearings. *See generally* Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983 (2016).

court.[119] Parties are not allowed to begin the trial stage until they go through this stage.[120] Access to justice concerns at this stage are crucial since for many parties, this is their main encounter with the courts.[121] The judge or magistrate is, for them, the official representative of the legal system. Our Judicial Conflict Resolution ("JCR") research, is a European Research Council ("ERC") commissioned research project, led by Professor Michal Alberstein from the Law School at Bar Ilan Univeristy. The project explores the changing roles of judges in the era of "vanishing trials," wherein settlements and plea bargaining far outnumber full and final verdicts. The five-year comparative study is taking place in three countries: Israel (project headquarters), England & Wales, and Italy.[122] The JCR project focuses on the pre-trial stage, and in the next Section, this Article elaborates on the relevant role of the judge within this stage.

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[119] *See generally* Sela et al., *supra* note 5.

[120] In England, when sides file a court claim, they must indicate what measures they have taken to settle and why those measures have been unsuccessful. *See* Allocation Questionnaire for Civil Claims http://www.daviessolicitors.co.uk/forms_davies/Civil%20Disputes/Allocation%20Questionaire.pdf [https://perma.cc/DLY4-KNAX] (last visited Oct. 21, 2019).

[121] *See generally* Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 WIS. L. REV. 215 (2018) (providing a general analysis of pre-trial hearings on the access to justice of litigants).

[122] *Research*, JCR COLLABORATORY, http://jcrlab.com/ [https://perma.cc/CMW7-55XH] (last visited Oct. 21, 2019).

vi. The Trial Stage

The trial stage is usually referred to as the main target for access to justice concerns.[123] The disadvantaged litigants usually aim to "have their day in court," and perceive the trial as the execution of ideal justice.[124] Most of the literature is focused on broadening the procedural justice horizons of this stage; however, some of the highly debated questions today include whether reaching this stage is indeed the highlight of legal access.[125] For example, the Woolf Reform in England and Wales (which was the largest civil justice reform that took place in 1999, and was aimed at increasing court efficiency and access to justice),[126] has promoted the opposite

[123] Nolan-Haley, *ADR's Access to Justice*, *supra* note 19, at 380.

[124] Based on interview with litigant carried out for the JCR research [on file with author].

[125] Cappelletti & Garth, *supra* note 3, at 182 ("The words 'access to justice' are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system — the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state."). Yet more recent literature has focused on access to justice and how potential pitfalls can arise from the manner by which judge's facilitate settlement. *See* Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51 (2007); *see also* Nolan-Haley, *ADR's Access to Justice*, *supra* note 19 (focusing on the significance of consent inside and outside the legal process in relation to access to justice).

[126] The Woolf Reform was based on the Woolf Report, which was written by Lord Woolf in 1994–1995, and led to the adaptation of a new system of civil rules. The new rules highlighted the use of ADR and technology, tried to simplify litigation to make it more accessible to the

perspective, and under the search for access to justice, favors "more, better and earlier settlements."[127] Much criticism has been written on this reform, challenging its claim to improve access to justice by looking into the way it has unfolded in reality.[128] However, it can be argued that the Woolf reform suggests a new perspective on proportional access to justice.[129] There is a gap between the layperson's expectation for access to justice and the system's perception of the services related to such a right. When efficiency becomes the guiding principle, wasting the valuable time of the judge is considered disproportional for achieving justice.

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public, and aspired to reduce the high costs of litigation. DEP'T FOR CONSTITUTIONAL AFFAIRS, ACCESS TO JUSTICE FINAL REPORT (1996), https://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm [https://perma.cc/Z5FK-QJ9H] [hereinafter WOOLF REPORT]; The Civil Procedure Rules 1998, SI 1998/3132 (Eng.).

[127] WOOLF REPORT, *supra* note 128, at 9.1.

[128] *See* Hazel Genn, *What Is Civil Justice for? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397 (2012).

[129] *See generally* JOHN SORABJI, ENGLISH CIVIL JUSTICE AFTER THE WOOLF AND JACKSON REFORMS: A CRITICAL ANALYSIS (2015).

vii. The Verdict Stage

The verdict reflects the written public formulation of the acknowledgment of rights for disempowered parties and the substantive normative acknowledgment of notions of equality.[130] The written decisions, and especially those of the rare cases resolved by the Supreme Court, are the most celebrated by legal scholars, and most cited for law students as part of their legal education. Some of these cases may acknowledge the rights of disadvantaged persons while expanding the legal doctrine to include them and protect their entitlements.[131] Other cases may express sympathy and provide obiter opinions for future developments while ruling in a formalistic mode that reinforces the existing status quo. Nevertheless, it is important to bear in

[130] *See* de Sousa Santos, *supra* note 51; Dworkin, *supra* note 51; Fiss, *Against Settlement*, *supra* note 49; Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 50, at 124; *see also infra* Part II.

[131] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down a Texas law that banned sodomy); Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) (holding that an employer will be held responsible under Title VII of the Civil Rights Act of 1964 for the acts of supervisory employees whose sexual harassment of subordinates creates a hostile environment); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954) (holding school segregation to be unconstitutional).

mind that such cases rendering written opinions are rare, and most of the time, cases do not reach the trial phase at all.[132]

viii. The Execution of the Verdict

The execution of the verdict and the implementation of the normative change in action many times requires an access to justice awareness that has a unique focus. Repeat players are more likely to enjoy a body of precedents "skewed" in their favor,[133] bargain for a contract amendment that will make the achievement of the disempowered party insignificant,[134] or minimize the influence of a broad reform.[135]

ix. Avoiding Future Conflicts and Implementing the Norm

Learning from existing conflicts entails establishing mechanisms to avoid the reemergence of the same problems, as well as the emergence of similar conflicts for other possible litigants. An expanded model of access to justice includes conceptualizing a preventative scheme to deal with similar issues, in the spirit of a DSD approach,[136] combined

[132] *See generally* Galanter, *supra* note 74 (underlining the argument in the U.S.); Kritzer, *supra* note 78 (underscoring the trend in the UK and Canada); Sela et al., *supra* note 5 (underscoring the findings of the JCR research on this topic in Israel).

[133] Galanter, *Why the Haves Come out Ahead*, *supra* note 8, at 101–02.

[134] *Id.* at 98–99.

[135] *Id.* at 100.

[136] *See generally* Andrea Kupfer Schneider, *Building a Pedagogy of Problem Solving: Learning to Choose Among ADR Processes,* 5 HARV. NEGOT. L. REV. 113 (2000); Andrea Kupfer Schneider, *The Intersection of Therapeutic Jurisprudence, Preventive Law, and Alternative*

with public law approach of enhancing structural reforms and educational program which will enable implementation of the new norms. Enabling social change by law requires a sophisticated and pragmatic attitude which acknowledges the resistance of conservative social forces. The possibility of large-scale changes in that sense is therefore doubted by some law and society scholars.[137]

Access to justice, then, does not simply come down to improving a person's access to courts or guaranteeing legal representation. To address the broader set of needs, a wider framing of access to justice is needed. Awareness of the full cycle of conflict prevention and resolution as framed by this model is required in each stage, and we will demonstrate this claim in reference to our own findings on judges' activities in an age of vanishing trials. The following section will focus on access to justice concerns of judges mostly during the preliminary hearing and will provide examples of the relevance of the full model while addressing this stage.

D. ACCESS TO JUSTICE AND THE VANISHING TRIAL — ADR IN PRETRIAL HEARINGS

Dispute Resolution, 5 PSYCH. PUB. POL'Y & L. 1084 (1999). *See* Smith & Martinez, *supra* note 68, at 130 (discussing the preventive phase within a DSD approach).

[137] *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing that no significant social reforms can be generated through litigation due to the weakness and infectivity of American courts, especially in comparison to institutions such as Congress and the White House or social movements such as the Civil Rights Movement. The author assesses the effects of key court decisions such as *Brown v. Board of Education* and *Roe v. Wade* to prove his arguments).

In many countries (notably common law countries), most legal cases do not end with a written adjudication.[138] The underlying factors of the vanishing trial phenomenon include a systemic strive for efficiency (in a high caseload environment) coupled with the influence of the alternative dispute resolution framework. Due to these factors, judges have shifted their focus from adjudication to case management and to the promotion of settlements as the means to end legal cases.[139] This activity takes place at the pretrial phase, which is also the first moment of a the actual encounter of the sides to a legal dispute with the justice system — beyond its bureaucratic aspects.

The law provides judges significant discretion in promoting settlements and ending trials, with different countries granting judges different tools to do so. In the United States, for instance, Rule 16 of the Federal Rules of Civil Procedures states that "the court may consider and take appropriate action . . . settling the case and using special procedures to assist in resolving the dispute."[140]

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[138] *See* Sela & Egozi, *supra* note 76 at 2, 11.

[139] *See* Alberstein, *supra* note 82; Diamond & Bina, *supra* note 77; Galanter, *The Vanishing Trial*, *supra* note 4, at 470; Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements* 46 STAN. L. REV. 1339, 1340 (1993); John Lande, *Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned* Almost *Everything I Need to Know About Conflict Resolution from Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191, 197–98 (2005); Resnik, *supra* note 79.

[140] FED. R. CIV. P. 16(c)(2)(1); *see also* The Civil Procedure Rules 1998, SI 1998/3132, art. 1.4 (Eng.) ("The courts must further the overriding objective by actively managing cases through

In Israel, the majority of cases in which judges are involved end in the pretrial phase. Empirical research carried out in Israel has shown that out of the 30% of filed cases that reach the litigation stage, 19% end in the pretrial phase and only 11% that end in the trial phase.[141] In the pretrial phase, 60% of cases end in settlement rather than a written decision that mandates judicial involvement.[142] Rule 140 of the Israeli Civil Procedure authorizes judges to be actively involved in this phase and "to examine the possibility of a settlement between the litigants."[143] Hence, settlement promotion, which occurs in the shadow of the law, has now officially become part of the pretrial judge's "job description."[144]

When examining the trajectory of a case within the legal system, it becomes clear that most of the cases entering the legal system are disposed of without any encounter with a judge. Cases that include fixed debts to banks and other institutions are not even brought before the courts. Disempowered parties may carry the burden of these debts, and no public intervention is assumed during these stages. As seen above, only 30% of cases proceed to trial, and many of these are resolved through consensual dispositions both in pretrial phases and trials.

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encouraging co-operating among parties, encouraging Alternative Dispute Resolution, fixing timetables, using technology, giving appropriate directions to ensure trials proceed quickly and efficiently etc."); Israeli Rules of Civil Procedure (1984) § 140 (Isr.).

[141] *See generally* Sela & Egozi, *supra* note 76, at 11–12.

[142] *Id*.

[143] Israeli Rules of Civil Procedure, 1984, § 140 (Isr.).

[144] Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. DISP. RESOL. 211, 234 (1995).

This evolving role of judges has drawn considerable scholarly attention, analyzing its nature and meaning for judges, litigants, litigation, and the legal system as a whole.[145] On the ground, the pretrial phase, with its extensive judicial involvement, has become a new public arena where settlements materialize in the shadow of the law, and access to justice receives a new meaning. This state of affairs raises significant questions similar to the ones that came up concerning ADR and access to justice for disempowered sides.[146] To begin, what are our expectations from judges vis-à-vis social inequality? Is it the role of the judge to close power imbalances in the courtroom and to "give a voice" to litigants? If they intervene and encourage settlements, does this compromise the normative function of the law? Moreover, what about the tension between the individual's case and justice in a broader sense, which has to do with creating a normative legal horizon? In other words, we seek to understand how the phenomenon of the vanishing trial affects access to justice for litigants and the role of the judge within this settlement scene.

In what follows, we analyze the unfolding of these dilemmas from the pre-litigation stage to trial. Under our proposed model, we demonstrate ways in which judges have attempted to solve these problems and increase access to justice of disempowered litigants within the settlement setting of pretrial. To this end, we bring evidence collected from the Israeli legal

[145] Carpenter, *supra* note 7, at 707–08 (pointing to judges who attempt to assist unrepresented litigants, and the need for consistency during such interventions as it relates to other litigants, litigation, and the legal system as a whole). *See generally* Shweder, *supra* note 127 (discussing the role of judges as case managers and the ethical questions this issue raises).

[146] *See generally* Fiss, *Against Settlement*, *supra* note 49.

system, which has special characteristics that amplify the dilemmas judges face when adjudicating against the backdrop of the phenomenon of the vanishing trial.

One of the judges interviewed lamented about the advantages and disadvantages of inducing settlement:

> It is important that judges promote a settlement when it is the right thing for the litigants. . . . Perhaps the judge can suggest an out-of-the-box solution or resolve a few conflicts at once. At the same time, judicial experience should guide considerations not to settle . . . such as empowering a disadvantaged litigant that dared to take judicial action. In that case, perhaps, it is the role of the system to encourage them and others like them to request judicial action.[147]

The Israeli justice system is an adversarial one, yet judges have inquisitorial authority during the pretrial stage.[148] While a strict division exists between the pretrial and the trial stage, the same judge sits throughout the entire legal case. Thus, if litigants refuse a settlement proposition, the judge who offered it nevertheless remains on the case. Second, in Israel, a unique legislative mechanism exists that provides judges with a quasi-arbitration authority.[149] Article 79A of the Israeli Courts Law stipulates that "[a] court presiding over a civil matter is allowed, by consent of the parties, to rule in the matter before it, partly or fully, by way of compromise."[150] This mechanism allows judges great flexibility in the courtroom. It also enables them to deliver a "bottom-line outcome without a reasoned decision, to rule an outcome that does not result from strict application of the law, or to simulate a fair settlement between the

[147] Justice Dafna Barak Erez, Comments at the Bar Ilan University Law and Society Conference (Jan. 28, 2018) [on file with author].

[148] Israeli Rules of Civil Procedure (1984) § 40 (Isr).

[149] Courts Law, § 79A (Isr.).

[150] *Id.*

parties."[151] This extended discretion, however, does not come with precise and definitive instructions governing its use. It enables some bending of the formal law to address disadvantaged parties and mitigate harsh consequences that may result from a strictly formal application of the law.[152]

In interviews carried out with retired Israeli judges who adjudicated pretrial hearings, the judges seemed to have developed their own perception of justice that resulted from their experience pursuing settlement.[153] The procedural flexibility given to them has affected the substance of their decision-making when coming to ensure access to justice for disadvantaged litigants, and when addressing the particular case at hand while applying the universal aspects of the law: "When you see a very weak litigant facing a very powerful one . . . you know that [only] if you write a judgment you can have justice. . . . You will have to stray from the accepted interpretation of the norm you are applying . . . to 'concretize' it to the case at hand in order to get the result which you think is the correct one."

Another judge lamented on the implications of adjudicating versus encouraging disempowered sides to settle. On the one hand, she was concerned that "turning to the path of compromise will only duplicate the weakness with which they arrived to the legal

[151] Sela et al., *supra* note 5, at 104 n.75.

[152] Yuval Sinai & Michal Alberstein, *Expanding Judicial Discretion: Between Legal and Conflict Considerations*, 21 HARV. NEGOT. L. REV. 221, 276 (2016).

[153] The interviews are on file with author.

process . . . ."[154] On the other hand, "[t]here are instances in which [advocating a settlement] is better for the sides and is necessarily more useful."[155]

Judges also tried to negotiate between creative justice for the particular case at hand and justice for the greater good, such as refraining from delayed justice and delivering verdicts in a timely manner: "When reaching a compromise, you can offer a solution that is outside of the box, or reach an agreement that can simultaneously resolve a few conflicts."[156]

As judges do not have specific instructions using the extended discretion granted by law, what seems to guide them when negotiating between the law and the particularities of the case at hand is their own sense of justice:

> "When a judge sits in court, he has the law on the one hand, and on the other hand there is what he feels towards the case, which does not always go hand in hand with the law . . . . Every judge encounters this conflict. If he wants to resolve the situation using a settlement agreement and he is super-sophisticated, he needs to know how to bring into the formal power relations his own sense of justice. It is like a coat and a hanger. The hanger is the law, and the judge's sense of justice is like a coat, which is what actually envelopes the law . . . . Either that or you work only with the hanger of law and you must hurt people to hang them on the hanger. If, however, you want to bring the coat as well, that is everything else besides the law, you must be very clever in the ways in which you will bring the sides to an agreement that will include a component of decency."[157]

This expression goes together with informal conversations we conducted with judges,[158] accompanied by some public lectures, in which they speak about "the justice of settlement," in

[154] *See generally* Justice Barak Erez, *supra* note 149.

[155] [on file with author; citation forthcoming].

[156] Justice Barak Erez, *supra* note 149.

[157] [on file with author; citation forthcoming].

[158] On file with author.

contrast to "formalistic justice."[159] The settlement, according to this expression, is a more flexible setting that enables tailor-made justice, which many times can be more adapted to the needs of disempowered parties. Judges may exert some pressure on the strong party to exceed his legal obligation due to his deep pocket, for example. They may use the flexibility of section 79A to mitigate potentially harsh consequences for disempowered parties resulting from the formal application of the law.[160] In encouraging parties to settle, they may call to supplement legal principles with other considerations such as social justice.

Courtroom observations carried out in Israel revealed a host of techniques judges used to mitigate the power imbalance between litigants.[161] In a case between an insurance company and its client, where a clear power imbalance existed between the sides since the former was not only wealthier but also a repeat litigant, the judge invoked his authority and the prediction of a negative judicial outcome to order the insurance company to settle with the client: "If you think

[159] Justice Ofer Groskopf of the Israeli Supreme Court in a panel during the Workshop on Trends in Legal Formalism and the Judicial Role: Jurisprudence Meets Empirical Legal Studies, Bar-Ilan University, December 2016 (on file with author).

[160] For the possibility to use this section for such a purpose, see Sinai & Alberstein, *supra* note 155, at 241–42. This practice was also acknowledged in formal conversations with judges (based on interviews with retired judges in Israel that are on file with author).

[161] For an extended analysis of these techniques such as prediction, direct facilitation of litigotiation, emphasizing the legal aspects of the legal process, and more, see Sela et al., *supra* note 5.

that this case will end without compensation you are greatly mistaken . . . . I suggest you go out and end this saga without letting me decide it."[162]

Other judges go further in actively assisting disempowered litigants. In a housing case between a landlord and a protected tenant who was about to be forcefully vacated from government-subsidized housing for a small debt, the judge intervened on behalf of the tenant. The judge began the hearing stating that he does not want the tenant "have to choose between paying his rent, buying food, or paying for medication."[163] Off the record, the judge asked the sides what were their red lines beyond which they will not settle, and he based his settlement offer accordingly. When the landlord refused the judge's offer stating that she was not the welfare bureau, the judge told her: "I am trying to find a situation in which the lion will be full, and the sheep will be whole."[164] When the landlord finally agreed to the offered settlement, the judge addressed her personally and thanked her for her kindness and the good deed she has chosen to do towards the tenant.[165] This approach reflects awareness of the various stages of the conflict and to its complex, cyclic nature.

In another case, in which a flight company canceled a flight, causing a passenger to miss her flight and as a result, not to see her mother before death, the judge directly expressed his identification with the plaintiff and asked the flight company to meet the plaintiff halfway, even

[162] [on file with author; citation forthcoming].

[163] [on file with author; citation forthcoming].

[164] [on file with author; citation forthcoming].

[165] Kim Yankelovitz, *Conflict Resolution from the Point of View of the Judge*, unpublished seminar research paper, 20–22 (2019).

if not required to do so. "Such a victory will be emotionally significant for the plaintiff, and will provide compensation for a loss that cannot be compensated for [the death of the mother]; and for a company your size no real damage will be done by providing a small compensation such as this."[166] This approach goes beyond access to justice as fulfilling rights, but also as acknowledging needs and emotions.

In a case between a landlord and a tenant, the judge took on an active role and gave a prediction of a possible legal outcome, warning the tenant of the risk of pursuing the claim rather than settling. "I want to give her (the plaintiff) money . . . she needs to understand, however, that she made a grave mistake and that pursuing this case might end with her putting her hand into her pocket and paying more."[167]

Addressing the plaintiff directly, the judge emphasized:

> I want to help you. . . . I am assessing this case, but legally it is problematic. Not ethically or morally. There are two options: one, I hope he [the landlord] will agree to pay and will say "I made mistakes" and "I am satisfied with this amount." Two, to go ahead with this case, means paying the lawyer's fee and perhaps even having to pay the other side. But I want you to listen well — I am really not against you. This is dangerous! Because we have here a situation of 'he said, she said.'[168]

Laying out the options before her, the judge gave the tenant, the weaker side, a prediction regarding the financial risks involved if she did not settle.

[166] [on file with author; citation forthcoming].

[167] [on file with author; citation forthcoming].

[168] [on file with author; citation forthcoming].

One judge indicated that he used court procedures to avoid manipulation by repeat players.[169] On the one hand, he scheduled closing hearing dates when companies were reluctant to progress in a case (as they hoped that the opposing parties would give up).[170] While on the other hand, he postponed hearings for more than a year when he expected a repeat player to settle though there might not be a strong legal claim.[171]

These examples demonstrate that in a world of vanishing trials and increased settlements in the pretrial stage, courtroom judges are key players in ensuring access to justice. They do so by carrying out a host of JCR techniques that include predictions, using court procedures to encourage a balanced solution, expressing their sympathies with the weaker litigants, or warning them of the risks involved in legal proceedings. Moreover, most importantly, regarding ensuring a fair trial and access to justice, they do all of that as they negotiate this unregulated public sphere, in which settlement takes place in the shadow of the law.

Some judges manage to resolve tensions in ways that touch on the significance of the rule of law and the creation of a normative legal horizon. They acknowledge the importance of judicial decisions and their public visibility, influence, and effect, and refrain from the risk of misuse of judicial authority using ADR practices in court. One such successful instance of ensuring a broad perception of access to justice by using JCR, which merits special attention due

[169] [on file with author; citation forthcoming].

[170] [on file with author; citation forthcoming]. [id., probably]

[171] [on file with author; citation forthcoming]. [id., probably]

to its public significance, happened in a recent high-profile gender discrimination Israeli case between an airline and a female passenger.[172]

On February 12, 2015, 82-year-old Renee Rabinowitz boarded an El Al flight from New York to Tel Aviv and took her seat in business class. Shortly after, she was asked by a flight attendant to change her seat to accommodate the request of an Orthodox Jewish man who refused to sit next to a woman.[173] After failed attempts at protesting the seat change, Ms. Rabinowitz moved and later sued El Al for gender discrimination.[174] The case received considerable public attention in Israel,[175] as the incident followed other religiously motivated attempts of gender segregation, such as requesting women to sit at the back of buses that serve ultra-Orthodox neighborhoods.[176] At the same time, almost no attention was given to the fact

[172] Rabinowitz v. El Al lawsuit, T.A. Magistrate Court.

[173] *Id*. at 2.

[174] *Id.* at 3.

[175] *Holocaust Survivor Sues El Al for Gender Discrimination*, THE TIMES OF ISRAEL (Feb. 27, 2016), https://www.timesofisrael.com/holocaust-survivor-sues-el-al-for-gender-discrimination/ [https://perma.cc/4U8T-DMZH]; Nir Hasson & Rina Rozenberg Kandel, *El Al Hit by Gender Discrimination Suit over Ultra-Orthodox Seating on Planes*, HAARETZ (Feb. 27, 2016), https://www.haaretz.com/israel-news/el-al-hit-by-gender-discrimination-suit-1.5410179 [https://perma.cc/7H34-AUZB].

[176] Joshua Mitnick, *From Back of the Bus, Israeli Women Fight Segregation*, WALL ST. J. (Jan. 5, 2012), https://www.wsj.com/articles/SB10001424052970204368104577136253309226604 [https://perma.cc/7PA8-8QM6]; Or Kashti, *'Only Room for Men': Driver Denied Israeli Woman*

that such a high-profile case that had great relevance to the setting social norms of equality and justice, ended with a settlement rather than a judicial verdict.

The hearing protocols reveal that the presiding judge in the case, Judge Dana Cohen-Lekach in Jerusalem Magistrate Court carried out a de facto mediation process in order to facilitate conciliation and lead both sides to agree to a resolution mutually. The judge explained the differences between the various types of discrimination when asking the airline representatives "what is the difference between a situation in which there is a request ahead of time of a man not to sit next to a woman, to which you automatically say no, to a situation on the ground when a man asks that,"[177] and further asking whether they would accommodate a traveler's request not to sit next to a woman when purchasing the flight ticket. The representatives said that they would not accommodate such a request.[178] Judge Cohen-Lekach continued to ask "A passenger boards, and asks the flight attendant: "I want a sit not next to an Arab passenger." What is the flight attendant supposed to do as far as El Al is concerned?"[179] They answered that they would not accommodate such a request either.[180] Off the record, the judge emphasized the difficulties facing the flight attendants who needed to manage such

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Entry on Bus to Ultra-Orthodox Town, HAARETZ (July 10, 2019), https://www.haaretz.com/israel-news/.premium-only-room-for-men-driver-denied-woman-entry-on-bus-to-ultra-orthodox-town-1.7486509 [https://perma.cc/W5QH-URLC].

[177] Rabinowitz v. El Al Hearing Protocol, at 2.

[178] *Id*.

[179] *Id.* at 3.

[180] *Id.* at 3.

complicated and sensitive situations under time pressure, and with the responsibility of ensuring a timely takeoff.[181]

After these discussions, both sides requested to hear what the court had to say, asking that the discussions remain informal and undocumented, and stating that they would not be obliged to accept the court's suggestions.[182] The sides were asking to take advantage of this informal space and discuss with the judge, off-the-record, and thus with no documentation, how she viewed the possible legal outcome. Following this interaction, Ms. Rabinowitz and El Al came to an agreement, under which the airline agreed to refrain from accommodating any future passengers' request to change their seat due to the gender of the neighboring passenger. El Al further committed to training the entire crew of the company's flight attendants regarding prohibited gender discrimination per the Israeli Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 2000.[183] Ms. Rabinowitz, for her part, received symbolic monetary compensation for her hardship: $1800 out of the $15,000 she demanded in the lawsuit.[184]

This case, which dealt with an important public issue and whose sides were significantly unequal in their economic ability — and the fact that one was a repeat litigant while the other a

[181] Interview with the lawyer of the prosecutor at the Rabinowitz v. El Al case (on file with author).

[182] Rabinowitz, *supra* note 112, at 4.

[183] Israeli Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 2000.

[184] Rabinowitz v. El Al verdict, at 1.

one-shot litigant — crystallized the challenges posed by the vanishing trial to the broader notion of access to justice. First of all, the case ended with a settlement agreement that received great public attention and was covered in the Israeli media as though it was an adjudicated precedent.[185] A normative legal horizon was provided on this significant issue in Israeli society, prohibiting further gender discrimination in the airline. Second, Judge Cohen-Lekach's use of judicial intervention techniques such as dispute resolution practices in order to bring the sides to an agreement, allowed her to empower a litigant that suffered discrimination. Her use of judicial creativity in an unregulated public sphere that oscillates between "pure" decision making and mediation underscored her own understanding of justice, and what must be done to ensure it. Her emphasis on the prevention of future conflicts and on training the airline staff in order to avoid discrimination is a sensitive implementation of a law and society perspective of disputes. She took into account the various stages of the conflict, as discussed above, and addressed its complexity.

To conclude the section dealing with judicial activity during pretrials, we will give one example of increased sensitivity to access to justice during the execution stage and as manifested by registrars. In Israel, debt enforcement court is a judicial arena in which disempowered litigants come to court for debt rescheduling or debt forgiveness, and it has become an arena in

[185] *See* Isabel Kershner, *Israeli Woman Who Sued El Al for Sexism Wins Landmark Ruling*, N.Y. TIMES (June 6, 2017), https://www.nytimes.com/2017/06/21/world/middleeast/israeli-woman-who-sued-el-al-for-sexism-wins-landmark-ruling.html [https://perma.cc/FJ4K-Y6N2].

which registrars employ sensitive mechanisms of enforcement in the execution stage.[186] In some cases, when realizing that debtors owe an amount that exceeds their ability to pay, the registrars assesses the debtors' particular circumstances and use legal procedure to assist them. For instance, if they assess that the payment amounts will eventually constitute only a minuscule sum of the total owed, a registrar can decide to erase the debtors' debts by declaring them "limited means" debtors.[187] In other cases, registrars forgive the debt if the creditors do not show up for the court hearing. [188] In adherence with the principles of access to justice, registrars justify such decisions by interpreting the law in a manner that develops systemic solutions for delivering justice: "[T]he law also includes directives which are social in their conceptual basis . . . the legislator did not mean that activating the collection mechanism will leave the debtor destitute and as a burden on society."[189] As such, these registrars, aware of the particular difficulties facing disadvantaged litigants, use the discretion granted to them by the law to develop and

[186] Registrar Yniv Dori Dayan elaborated at a conference on Debts and Conflict Resolution held at Bar Ilan University, Israel, on 25.2.2019 regarding the various mechanisms he uses to help disempowered debtors who owe large amounts of money due to interest. He assesses their particular circumstances and applies the law creatively to consolidate debts and create special payment arrangements.

[187] Tel Aviv Execution Office Decision, April 05, 2018 (on file with author).

[188] Tel Aviv Execution Office Decision, March 09, 2018; Decision from March 15, 2018; Decision from March 20, 2018; Decision from May 10, 2018.

[189] Tel Aviv Execution Office Decision, April 16, 2018. (On file with author).

implement their own perspective of justice appropriate for the case at hand.[190] In some systems, non-represented litigants are excluded from such preliminary negotiation requirements.[191]

In what follows, we present an "ideal type" model of access to justice via an analysis of the case of the justice system in Quebec, which incorporated the access to justice framework into its justice system, relying mainly on a conflict resolution perspective.

E. AN "IDEAL TYPE"? THE CANADIAN CIVIL CODE DECLARATION

In the past decade, the Canadian government has made access to justice a national priority.[192] Canada is divided into sub-national provinces that have their own territorial

[190] Rabinowitz v. El Al, Tel Aviv Magistrate Court, TA 14588-03-16 (2017) (according to Registrar Dori this is a common practice among registrars).

[191] THE ISRAELI CIVIL PROCEDURE REGULATIONS, 5744-1984, Section X.

[192] *See* Cappelletti & Garth *supra* note 3, at 184–85. "Chief Justice of the Supreme Court of Canada Beverly McLachlin P.C.'s speeches on access to justice. E.g., Chief Justice Beverly McLachlin P.C., Why Should We Care About Access to Justice?, NAT'L MAG. (Aug. 17, 2013), http://www.nationalmagazine.ca/Blog/August-2013/Why-should-we-care-about-access-to-justice.aspx; Chief Justice McLachlin Speech to CBA Council 2012, CANADIAN LAW. MAG. (Aug. 11, 2012), http://www.canadianlawyermag.com/4273/chiefjustice-mclachlin-speech-to-cba-council-2012.html; Lucianna Ciccocioppo, *There is No Justice Without Access to Justice: Chief Justice Beverley McLachlin*, U. OF TORONTO FACULTY OF LAW 2 (Nov. 11, 2011), http://www.law.utoronto.ca/news/there-no-justice-without-access-justice-chief-justice-beverley-mclachlin [https://perma.cc/8AFZ-ULZU]; C.J. Beverley McLachlin, *Remarks to the Empire*

governments, which abide by the Canadian Constitution.[193] Each province has discretion in implementing "access to justice" as a judicial principle. The government of the Quebec Province in Canada has made access to justice a priority via legal reforms and institutional frameworks, led by a vision of participatory justice and fair-minded legal processes, the transformation of legal services, and institutional measures.[194]

Advancing a legal culture that perceives litigants as clients of the justice system and as agents with an active role in legal proceedings, the Quebec civil law province has placed conflict

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Club of Canada: The Challenges We Face 6 (Mar. 8, 2007), http://www.cfcj-fcjc.org/sites/default/files/docs/2007/mclachlin-empireclub-en.pdf [https://perma.cc/KW92-JDET].

[193] Roberge, *supra* note 114, at 325 n.5 ("Canada is a federation: The Constitution provides for a division of powers among the federal government, the ten provinces, and three territories. Because the administration of justice comes under provincial jurisdiction, we find a variety of access to justice measures, including settlement conferencing practices in different provinces"); Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), *reprinted* in R.S.C. 1985, app II, no. 5 (Can.), ss. 91–92 [hereinafter Constitution Act].

[194] *See* Roberge, *supra* note 116, at 325; *see also id.* at n.8 ("With this new Code of Civil Procedure, I would like to instill a culture change among all stakeholders of the judiciary . . . We are going, with this reform, to modernize the procedure in our courts so Quebec's civil justice will move from the 20th to the 21st Century. This shift shall make our justice system, more accessible, faster, less heavy and less costly, while appealing to new ways of doing things.") (alteration in original); *see* Constitution Act, *supra* note 195.

resolution at the fore as the main solution for legal disputes and made adjudication to be the last resort.[195]

In contrast to the Woolf reform discussed above,[196] which announced the same goals of promoting access to justice and making adjudication the last resort, this reform provides an alternative vision of law from the outset. The legislative reform began in 2003, with the adoption of an amendment to the Code of Civil Procedure.[197] It was completed in 2014 when the New Code of Civil Procedure of Quebec was adopted, and administration of civil justice was made part of the province's constitutional responsibility.[198] The Code made access to justice a public good meant to serve both public and private interests, and it stipulated the precise components of the framework:

> The Code is designed to provide, in the public interest, means to prevent and resolve disputes and avoid litigation through . . . efficient and fair-minded process that encourages the persons involved to play an active role. It is also designed to ensure the accessibility, quality and promptness of civil justice, the fair, simple, proportional and economic application of procedural rules, the exercise of the parties' rights in a spirit of co-operation and balance, and respect for those involved in the administration of justice.[199]

[195] Roberge, *supra* note 114, at 326.

[196] *See* discussion on page [TBD – to be added later] of the Article.

[197] Code of Civil Procedure, R.S.Q., c C-25 (Can.), replaced by R.S.Q., c C-25.01.

[198] An Act to establish the new Code of Civil Procedure, S.Q. 2014, B. 28 (Can.) (enacted), http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-28-40-1.html [https://perma.cc/B2Z9-8UYT] [hereinafter Bill 28].

[199] *Id.* at Preliminary Provision.

The Code reversed the preferred modes of settlement, rendering negotiations and mediation the preferred methods to end a dispute, and trials before a judge the last resort. In Article 1, it calls the parties to first consider "private prevention and resolution processes before referring their disputes to the courts."[200] This call offers a new formula for promoting access to justice and delivers the message that access to justice is not access to the full process of adjudication that ends by a written verdict, but is related to participation, and needs satisfaction and cooperation between parties. Rather than being passive and accepting protection from the state, disadvantaged litigants are called to take an active role and experience citizenship and participation. Authoritative top-down protection of rights by judges is no longer the paradigm of justice according to this formula. By defining the goals of the institutions of law as preventing disputes and resolving them, while empowering citizens, the Code goes beyond the efficiency-oriented drive in other legal systems. Access to justice is not a commodity that is given to parties according to a rights-oriented legal measure that provides affordable levels of legal procedures. Instead, a more radical perspective of this notion, combining a dispute system design perspective with a law and society idea of dispute as a social construct, suggests that encouraging awareness of disputes in various stages is crucial, together with a call to avoid them altogether, and to engage with them constructively once they happen.

The extrajudicial private modes listed in the Code name direct negotiations between the parties or third-party led mediation or arbitration. Articles 2–7 list the principles by which the negotiations between the parties must take place, which include good faith, transparency, active cooperation, and confidentiality. Once the dispute has reached the courts, a judge must first

[200] *Id*. at art. 1.

carry out a settlement conference. Thus, the Code prevents disputes from becoming litigious.[201] In the settlement conference, the judge facilitates a settlement discussion between the parties. If they do not come to an agreement, the trial takes place before a different judge — not the judge involved in the negotiations of the failed settlement agreement. Trial before a judge is positioned as a last resort, and the Code sets this as a normative interpretive framework.[202] The coherent integration of negotiation and mediation efforts in and outside the courtroom, accompanied by a substantive perspective on the quality of such negotiation and the active, sincere participation required, seems to provide a more fertile ground for promoting access to justice. If these aspirations are indeed reflected in the legal culture of Quebec, it may provide the missing piece in the common access to justice approach as described in this article.

The Canadian model developed in Quebec can be described as a more developed form of access to justice, which takes into account our multilevel model of access to justice as described

[201] *See* Roberge, *supra* note 114 at 359, 326 n.12 ("Montreal Bar Press Release, The Honourable Francois Rolland, Chief Justice of the Superior Court of Quebec (Nov. 17, 2014). On the 7th Annual Round Table of the Bar of Montreal on Participatory Justice, an invitation to the legal community was launched to take the turn of participatory justice: "The court simply cannot be the first forum which is approached to have a dispute resolved. There is evidence that the prosecution responds poorly to the needs of our citizens who want convenient and expeditious solutions to their problems, at a reasonable cost. . . . It is in this spirit that participatory justice exists." (translation by author)).

[202] Bill 28, *supra* note 200, at arts. 161–65.

in Part C.[203] This model provides a new ideal for a justice system in which adjudication is in decline and trials vanish. Instead of perceiving the shadow of adjudication and trial as the main reference point for handling preliminary stages and pretrial, the idea of problem-solving, conflict resolution, and prevention of future equivalent cases becomes the guideline for justice promotion and consequentially of access to justice.

This approach to legal conflicts can be presented as a public health perspective of law. [204] Public health is defined as "the science and art of preventing disease, prolonging life and promoting health through the organized efforts and informed choices of society, organizations — public and private, communities, and individuals."[205] The principles of public health, distinct from those of clinical medicine that are more focused on medicalized treatments of individuals in a clinical setting, are based on a population approach, an approach to health that aims to improve the health of the entire population and to reduce health inequities among population groups. In order to reach these objectives, the public health paradigm looks at and acts upon the broad range of factors and conditions that have a strong influence on our health. Components include: (1) a

[203] *See supra* Part C.

[204] For elaboration on the relationship between conflict resolution and public health, see Nadav Davidovitch & Michal Alberstein, *Therapeutic Jurisprudence and Public Health: A Broad Perspective on Dialogue*, 30 T. JEFFERSON L. REV. 507, 524 (2008); *see also* Michal Alberstein & Nadav Davidovitch, *Intersecting Professions: A Public Health Perspective on Law to Address Health Care Conflicts*, 83 INT'L J. L OF CONFLICT ENGAGEMENT & RESOLUTION 2017 (5) 1-2.

[205] DEREK WANLESS, BRITISH HM TREASURY, SECURING GOOD HEALTH FOR THE WHOLE POPULATION 3 (2004).

focus on primary care prevention and health promotion; (2) targeted studies of the economic, political, and environmental factors that may affect populations and cause diseases; and (3) ways in which the modification of social and environmental variables may promote public health aims (through active social and political involvement).[206] This strategy contrasts sharply with that of "traditional" clinically oriented medicine, especially as practiced in hospitals. Our access to justice conflict resolution perspective transcends the focus on the individual dispute and the focus on the past, in favor of a social perspective on the nature of disputes and a focus on primary prevention. It is a comprehensive approach, which presents law as focusing on primary prevention through relationship building, and on altering the social conditions that produce legal conflicts while digging deep into their source. Such a public health approach to law can be elaborated through the use of DSD methodologies, and their study should be a central part of legal education.

F. CONCLUSION — ACCESS TO JUSTICE IN AN AGE OF VANISHING TRIALS

This Article provides a new perspective on access to justice while integrating a conflict resolution approach with a socio-legal dispute perspective in an age of vanishing trials. The multilevel model suggested in this paper provides a kind of public health approach to access to justice, assuming that avoiding conflicts while encouraging the naming and the surfacing of disputes at the bottom of the pyramid, is an important goal of the legal system. Focus on individuals and informed consent are not enough to deal with structural and social frameworks

[206] For a recent general overview of public health characteristics, see U.S. INSTITUTE OF MEDICINE, NATIONAL ACADEMIC ACADEMY OF SCIENCES, THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY 3–4 (2003).

that repress conflicts, and thus preserve injustice. Active engagement with the bottom of the pyramid of disputes through consciousness-raising and providing means to avoid and resolve disputes is an essential task that legal systems should commit to in explicit, coherent terms.

In the long run, as adjudication in its full form will continue to decline, more focus on the pre-litigation phases should be encouraged. The Briggs report[207] and some new technological reforms such as online courts,[208] which developed in recent years, encourage such focus. In the meantime, as we observe the contemporary public sphere which has shifted today to preliminary hearings, such as pretrials, this Article demonstrates that judges develop new practices and perspectives which adapt to the settlement arena. Judges are aware of the difficulties inherent for disempowered parties within the settlement scene. They have their own construction of the justice inherent in the situation of pursuing consent and affected by the justice system's bureaucratic constraints. They try to balance rights with social justice and to challenge the neutrality of the bargaining terrain. Nevertheless, considering the multilevel perspective outlined here, and the minimal involvement of judges within the track of civil cases as implied by our empirical study, these expressions are only a small component of the access to justice perspective.

[207] LORD JUSTICE BRIGGS, JUDICIARY OF ENGLAND AND WALES, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT (2016), https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf [https://perma.cc/L8HZ-UEDL].

[208] *Id.* at 36.