

Annotated Bibliography

Lisa Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice* (Ottawa: Status of Women Canada, September 1998).

Summary: This article takes a feminist perspective on the access to justice reform movements. Historically, discussions on access to justice reform have not considered the issues facing women specifically. Consequently, legal aid coverage does not reflect women's needs at different phases of their lives, nor do they reflect the diversity of women's legal needs.

- While the historical approach to access to justice sought to improve the provision of legal aid services for low-income individuals, it did not consider the legal needs of low-income women. If gender and diversity are not taken into account, low-income women will not receive substantive equality of access to the justice system
 - Other vectors of marginalization can further complicate the disadvantages faced by women; such as disability, being an immigrant or refugee, domestic abuse and Aboriginality.
- The concept of substantive equality has emerged from section 15(1) of the *Charter*.
 - The SCC has recognized that section 15 provides for substantive equality, the objective of which is to assist disadvantaged groups in overcoming inequality, by providing protections against discriminatory attitudes, practices and rules (*Andrews v LSBC*, (1989) 1 SCR 143).
 - "It is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context." (Wilson, J in *R v Turpin*, (1989) 1 SCR 1296 at 1331-32).

Constance Backhouse, "What is Access to Justice?" in Julia Bass, WA Bogart and Frederick H Zemans, eds, *Access to Justice for a new Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) at 113. Proceedings of a conference held in May 2003.

Summary: Efforts to enhance access to justice cannot be truly advanced if we do not consider variables such as Aboriginality, racialization, gender, disability, class and sexual identity. Access to justice is to be considered in light of these variables and their impact upon one's ability to obtain justice.

Mauro Cappelletti and Bryant Garth, eds, *Access to Justice Volume 1: A World Survey, Book 1* (Aphenaandenrijn: Sijthoff and Noordhoff, 1978)

Summary: This article traces the meaning of "access to justice" as a concept starting in the 1700's and continuing until the article's writing (in 1978). It addresses the difficulty in settling on an agreed upon definition of "access to justice", and the even greater difficulty in agreeing on what constitutes "effective" access. It provides an overview of some prevailing

barriers to justice, and points out some potential (though imperfect) solutions to overcome those barriers.

- The concept of access to justice has undergone many changes (pre-1978). The liberal 18th and 19th century states considered the right of access to judicial protection to only extend to a formal right to litigate or defend a claim. There was no obligation to protect natural rights through affirmative action programs
- As the laissez-faire societies grew, the concept of human rights changed to reflect the shift from individualistic to collective values so that social rights and duties were recognized.
- The focus on “access” in modern civil procedural scholarship recognizes that procedure serves a social function.
- The concept of “effectiveness” in “effective access” is difficult to agree upon. Optimal effectiveness is an “equality of arms” -- the ultimate result should depend only on the legal merits of the parties’ positions. This is an impossible utopian idea, so the question becomes how far should we push to eliminate barriers to effective access?
- Barriers to effective access include:
 - The high costs of litigation
 - Party capability: Financial resources allow the party to litigate, and/or to withstand delays. Some parties can use their power to use litigation as a threat where the other side cannot defend.
 - “One-shot” vs “repeat player” litigants: One-shot litigants typically have isolated and infrequent contacts with the judicial system. Repeat-player litigants have long-term judicial experience, which can be advantageous. Individuals tend to be the most reluctant to seek the benefits of the legal system; whereas organizations have less difficulty in taking advantage of their legal rights – often against “ordinary people” (i.e. individuals).
 - This gap in access can be remediated if individuals find ways to aggregate their claims (class action cases?) and develop long-term strategies to counteract the advantages held by organizations.
 - The special problems of diffuse interests. Diffuse interests are collective or fragmented interests. The basic problem for individuals is that either:
 - No individual has a right/standing to remedy the infringement of a collective interest; or
 - The stake of any one individual is too small to induce that individual to seek enforcement action
- In general, these barriers to access reveal that obstacles created by legal systems are most pronounced for small claims, isolated individuals and those lacking financial means. Conversely, the advantage goes to those with financial means (especially organizations), who are adept at using the legal system to advance their own

interests. The problem is complicated because many barriers are interrelated, and efforts to eliminate one barrier can exacerbate problems elsewhere. Thus, holistic solutions are necessary.

Bryant G Garth, "Comment: A revival of access to justice research?" in Rebecca Sandefur, ed, *Sociology of Crime Law and Deviance, Volume 12* (Bradford, GBR: Emerald Group Publishing Ltd, 2009) at 258.

Summary: This article criticizes the fact that lawyers are the primary parties leading access to justice research. Lawyers are wrapped up in the problem, and their relationship to the system and poor persons can create contradictions or conflicts. Law should not be presumed to be the solution to all social problems. Access to justice research should be undertaken by a broader spectrum of interested parties, who do not take the law's role in solving the problems to be a given. It also should consider what the law does (and does not) mean in people's everyday lives.

- Lawyers who deal with problems tend to think that only legal solutions to social problems are good ones. And it leads to simplistic exhortations that the unmet legal needs of relatively vague categories of the "poor" or the "middle class" require that lawyers try harder to fulfill those needs.
- The idea that law is the solution to all social problems should not be taken for granted.
- Access to justice research should include:
 - An awareness that familiarity with the legal system can be a recipe for inaction and discouragement rather than an assertion of legal rights;
 - An awareness that what lawyers provide is often simply a signal to the legal or administrative system to follow its own norms;
 - An awareness that the general supply of helping resources – not just access to law – has a major impact on how people act to remedy their problems
 - Looking toward a more general sociology of troubles that goes well beyond legal needs;
 - Questioning perceptions of problems and considering how race and ethnicity affect what access to justice might mean;
 - Instead of focusing on gaps in the provision of legal services and exhortations to close the gaps through good works, we should look at how pro bono lawyers act in relation to the professional, economic and career incentives that they face, versus so-called legal needs.
- Going forward, access to justice research should promise a better understanding of what the law means and does not mean in people's everyday lives, in terms of the problems of individuals and how best to ameliorate them.

Roderick A Macdonald, "Access to Justice in Canada Today" in Julia Bass, WA Bogart and Frederick H Zemans, eds, *Access to Justice for a new Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) at 19. Proceedings of a conference held in May 2003.

Summary: This article outlines the five "waves" in access to justice thinking from 1960 until the article's writing (in 2005). It started with purely focusing on access to lawyers and courts, but soon thereafter moved to discussion on institutional redesign. The third "wave" sought to de-mystify the law. In the 1990's, the fourth "wave" sought to implement preventative law and the growth of ADR. Under the fifth wave approach, access to justice requires a very broad interpretation, as all issues of interpersonal or group relationships call forth considerations of substantive justice, procedural fairness and equal access to legal institutions.

- There have been five "waves" in access to justice thinking so far. The concept of "waves" of access to justice was first introduced by Cappelletti and Garth in their 1978 book "Access to Justice: A World Survey" (see above).
- The first wave (1960-1970): Access to lawyers and courts
 - "Practicing law for poor people"
 - The main issues were cost, delay and complexity in the legal system
 - The establishment of legal aid programs to permit the poor to benefit from the services of a lawyer for criminal cases as well as welfare, housing and employment-related agencies
- The second wave (1970-1980): Institutional redesign
 - Most of the reforms focused on the civil justice process, with the goal of speeding up lawsuits, reducing costs and enhancing the availability of legal redress. These reforms include the creation of small claims court, class action, modified discovery rules and contingency fees
 - The government also developed "mass adjudication," by forming non-judicial institutions outside the courts to deal with specific types of claims
- The third wave (1980-1990): Demystification of the law
 - Following the creation of the *Charter*, access to justice began to be understood as a problem of equality. A more substantive meaning was given to "equality" so that the definition now embraced equality of outcomes, not just the opportunity and capacity to litigate.
 - The courts also implemented modern organizational procedures for certain categories of cases using techniques such as "case management," "commercial lists" and "streamlined procedures." Substantive measures were taken to enhance access, which included reforms to family property law, successions and dependent's relief, real estate conveyancing, divorce and child welfare law.

- The principles and processes of criminal sentencing were also revamped, through young offenders legislation, sentencing circles for aboriginal offenders and by giving greater attention to the idea of “restorative justice”
- The fourth wave (1990-2000): Preventative law
 - The fourth wave recognized that true access to justice requires the implementation of multiple forms of alternative dispute resolution (ADR) processes to help citizens to either avoid conflicts or resolve them before they crystallized as legal disputes.
 - There was a movement to involve the public in decisions about law-making institutions.
- The fifth wave (2000-present): Proactive access to justice
 - Under the fifth wave approach, access to justice requires a very broad interpretation, as all issues of interpersonal or group relationships call forth considerations of substantive justice, procedural fairness and equal access to legal institutions
 - True access to justice entails a right to participation and access to aspects of the judicial system. In order to overcome the disempowerment, disrespect and disengagement felt by many citizens, access to justice must include improvements to access to legal education, the public service, the police/law enforcement, Parliament and law societies.

Beverly McLachlin, CJC, “Foreward” in Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds, *Middle Income Access to Justice*. (Toronto: University of Toronto Press, 2012) at 1.

Summary: Justice McLachlin lauded Canada’s justice system by referring to our society’s commitment to the rule of law, our human rights guarantees, and the complex body of law that governs the lives of Canadians. Having achieved a justice system that is the envy of many countries, we must also ensure that all Canadians can actually use the system that exists.

Mary Jane Mossman, “The Charter and Access to Justice in Canada” in David Schneiderman and Kate Sutherland, eds, *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) at 271.

Summary: There are tensions between differing perspectives on the law’s usefulness as a means of social change. Law can be a driver, as well as an impediment to social change. While *Charter* guarantees have not been effective in advancing access to justice for disadvantaged Canadians, its promise of equality can ground demands for change among the new generation of lawyers, particularly in light of the increasing diversity of students admitted to law schools in Canada.

- There is a complex relationship between law and social change. It is not a binary: law facilitates and inhibits social change. It is also important to acknowledge the change sometimes happens incrementally
- The SCC's interpretation of *Charter* s. 15 in *Andrews and Turpin* (both 1989) indicates that the SCC sees legal counsel as having the ability to enhance substantive equality before the law. However, *R v Robinson* ([1990] 63 DLR (4th) 289) concluded that section 15 of the *Charter* was not infringed by the denial of legal services to convicted appellants in criminal cases. Funding for appeals flows from the merits of the appeal case, and is not "an unqualified right to state-funded counsel" for all indigent (i.e. needy or poor) appellants.
- The *Charter's* equality guarantees appear to be ineffective in accomplishing concrete benefits in terms of better access to justice for disadvantaged Canadians. However, the *Charter's* promise of equality can ground demands for change among the new generation of lawyers, particularly in light of the increasing diversity of students admitted to law schools in Canada.
- Generally, this essay suggests that the equality guarantees in the *Charter* have had a greater impact on the make-up of the legal profession than on access to legal aid services.

Michael Trebilcock, Anthony Duggan and Lorne Sossin, "Introduction" in Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 3.

Summary: The author defines access to justice as the effective right of an individual to advance legitimate legal claims or defences against claims by others. He also draws a connection between access to justice and the rule of law. Most conceptions of the rule of law assume equality before the law and hence access to law or the justice system as one of its fundamental predicates.

Court Processes Simplification Working Group of the Action Committee on Access to Justice in Civil and Family Matters, *Report of the Court Processes Simplification Working Group* (Court Processes Simplification Working Group of the Action Committee on Access to Justice in Civil and Family Matters: May 2012). Online: Canadian Forum on Civil Justice <<http://www.cfcj-fcj.org/collaborations>>.

Summary: Access to justice requires members of the public to have the knowledge, resources and services to deal effectively with civil and family legal matters. When the services of the courts are required, they should be available as simply, effectively and proportionately as possible, while at the same time maintaining fairness and justice. Put simply, streamlined procedures and practices help reduce time and expense and typically, in turn, militate in favour of improved access to justice. The simplification of court processes has been consistently identified as one of the pillars of an effective approach to access to justice.

Cromwell, Thomas A, Meaningful Change for Family Justice: Beyond Wise Words (Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters: April, 2013). Online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/collaborations>>.

Summary: Justice Cromwell states that access to justice would exist in our society if people were given the knowledge, resources and services to deal effectively with civil and family legal matters. This is not a "court -centric" view – the knowledge and resources should not be constrained to the formal justice system. It includes a range of out-of-court services, including access to knowledge about the law and the legal process and both formal and informal dispute resolution services. Access to justice is bigger than access to litigation or even access to lawyers, judges and courts.

Ab Currie, “Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework” (Ottawa: Department of Justice Canada – Research and Statistics Division, 2003). Online: Department of Justice Canada <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/rr03_5.pdf>.

Summary: Currie argues that the third “wave” of access to justice reform (substantive equality and justice) should not be limited to the civil law sphere. Currie argues that this more substantive understanding of access to justice should include restorative justice and other holistic approaches to the criminal justice system and the delivery of criminal legal aid.

Ab Currie, “The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians” (Ottawa: Department of Justice Canada, 2007). Online: Department of Justice Canada <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf>.

Summary: This study takes a broad view of civil justice problems and unmet need. It looks at access to justice in terms of the prevalence of civil justice problems in the population. It involves identifying (through a sample survey) the civil justice problems people experience, whether or not they end up in courts or other formal dispute resolution mechanisms. This extensive report makes detailed findings about the prevalence and types of legal problems Canadians face on a daily basis. It’s findings are relied upon by multiple task forces (including, for example, the CBA Equal Justice Report that will guide access to civil justice reform over the next 15 years).

- People may face a variety of barriers to the formal justice system that limit the problems that are taken to the courts. Barriers can include low literacy, learning disabilities, limited English or French language skills, lack of knowledge about where to find help or, indeed, not knowing whether the problem has a legal solution or not.

- Courts and tribunals may not always be the most appropriate or effective ways to deal with justiciable problems. Even though problems may not be brought to the justice system for resolution, they are, nonetheless, legal problems.

Michael Dempster, "Justice for all", *Canadian Bar Association National Legal Insights & Practice Trends* 22:2 (March 2013) 12. Online: CBA National Magazine <<http://nationalmagazine.ca>>

Summary: The CBA's National Access to Justice Committee frames "access to justice" as the ability of low and middle-class families to get the legal help or information they need. While there is some acknowledgment that subsets of the population such as Aboriginality and disability can exasperate access to justice problems, they are only considered as additional complications that only matter if they coincide with a low-income situation.

Lois Gander, "New Partnerships and New Delivery Mechanisms" in *Expanding Horizons: Rethinking Access to Justice - Proceedings of a National Symposium* (Department of Justice Canada - Research and Statistics Division, 31 March 2000) at 11. <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_2-po00_2/op00_2.pdf>

Summary: This article considers whose conception of justice we should be considering, and what type of access we want to see looking for. In the author's view, Canadian citizens must be given the responsibility for determining what kind of justice they will have (for example, restorative justice). In terms of access, we should stop viewing justice as something delivered from one person to another. We all can realize justice in our daily interactions with different people. Justice is not so much delivered as it is made manifest and shared. Justice is something to be lived and experienced through daily activities, not something to be given to the population.

Omar Ha-Redeye, "Access to Justice Starts with Legal Tuition" *Slaw.ca* (5 May 2013), online: *Slaw.ca* <<http://www.slaw.ca/2013/05/05/access-to-justice-starts-with-legal-tuition/>>.

Summary: This analysis takes the broad social approach to access to justice. Ha-Redeye argues that the high costs of attending law school force young lawyers to avoid opportunities to advocate for marginalized peoples because of pressures to get a high-paying job so that they can repay their debts. This creates a barrier to the provision of access to justice, as lawyers do not enter legal fields which serve the public until mid-career, if at all.

Roderick Macdonald, "Justice Is a Noun, But Access Isn't a Verb" in *Expanding Horizons: Rethinking Access to Justice - Proceedings of a National Symposium* (Department of Justice Canada - Research and Statistics Division, 31 March 2000) at 3. <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_2-po00_2/op00_2.pdf>

Summary: The author argues that in order to increase access to justice, we must rethink our attitudes and expectations about who owns the law and what it can do for you. Public legal information does not always enhance access to justice. This information often

convinces the public that they need the system to solve their problems. “Access to courts” is not the same as “access to justice”. Justice can be achieved in many ways that may or may not involve the court. Furthermore, the institutions and processes designed to facilitate access to justice often use a white, male, non-immigrant English speaker as the paradigmatic plaintiff. We must empower a diverse citizenry in order to increase access to justice.

Alison MacPhail, *Report of the Access to Legal Services Working Group (Working Group on Access to Legal Services of the Action Committee on Access to Justice in Civil and Family Matters: May, 2012)*. Online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/collaborations>>.

Summary: The Committee views access to justice as a society in which the public has the knowledge, resources and services to effectively deal with civil and family law matters. This includes the prevention of disputes and early management of legal issues; negotiation and informal dispute resolution processes, and where necessary, through formal dispute resolution by tribunals and courts. In this society:

- Justice services are accessible, responsive and citizen focused;
- Services are integrated across justice, health, social and education sectors;
- The justice system supports the health, economic and social well-being of all participants;
- The public is active and engaged with, understands and has confidence in the justice system and has the knowledge and attitudes needed to enable citizens to proactively prevent and resolve their legal disputes; and
- There is respect for justice and the rule of law

Prevention, Triage and Referral Working Group of the Action Committee on Access to Justice in Civil and Family Matters, *Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector (Prevention, Triage and Referral Working Group of the Action Committee on Access to Justice in Civil and Family Matters: February 2013)*. Online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/collaborations>>.

Summary: This report establishes a vision of access to justice that focuses on the needs and concerns of individuals. It looks at legal problems from the point of view of the people experiencing them. In the Action Committee’s view, access to justice can be improved by emphasizing the Early Resolution Services Sector (ERSS). The ERSS can often respond effectively to the largest volume of legal problems people face in everyday life. This sector is dedicated to the “front end” of the justice system. It precedes, and often obviates the need for formal representation in the court system.

- The report recommends that priority and resources should be directed toward serving people as early as possible, as they begin to experience a legal problem. Efforts should not be directed solely at courtroom facilities. This views access to justice in a way that recognizes the breadth and depth of problems in people’s

everyday lives, and the need to develop a wide range of appropriate responses to these problems, rather than to funnel them to a single high cost destination (the courts and legal representation). This type of response begins with an understanding of the everyday experiences of individuals and whether they possess the legal capability to address problems. It then builds towards an analysis of the functions (triage, referral and advocacy) and services (PLEI, dispute resolution and legal clinics) required to support their capacity to understand, anticipate and resolve issues that have legal implications. In this paradigm, the formal justice system remains important, but is not the starting point.

- Why is it important to expand the concept of the justice system to include the ERSS? Despite the fact that the ERSS deals with a much larger proportion of people's everyday legal problems than the formal justice system, it has not been planned, funded or coordinated on a sustained basis as an important sector in its own right. Consequently, the expertise within this sector has been underutilized. Without clear acknowledgement of the role the ERSS plays, access to justice will remain a lofty vision unconnected to the daily lives and problems of the majority of people.

Deborah L Rhode, "Access to Justice: An Agenda for Legal Education and Research" (2013) 62:4 J Legal Educ 531.

Summary: This article notes the weaknesses in research and data on access to justice. First, there is disagreement about what exactly access to justice means. Some view it as a procedural right (e.g. access to legal assistance and processes to assist in the prompt resolution of legal disputes and social problems), while others view it substantively (e.g. access to a just resolution of legal disputes and social problems). A person's preferred definition of access to justice is often influenced by their interests and agenda. For example, the organized bar has a much stronger economic interest in promoting the use of lawyer's services than research and policies which support greater reliance on qualified non-lawyers and procedural simplification.

- People who focus on the demand side of access to justice focus on unmet needs. Efforts to map unmet needs are often incomplete and fail to take account of problems that do not find their way into the formal legal system. They also do not capture collective problems addressed by public interest groups. Further, they do not indicate the effect of barriers such as those created by disability, language barriers, geographic isolation, insufficient information or lack of confidence in the value of seeking assistance. Persons interested in the supply side of the market focus on service providers, but their research frequently omits information about "low bono" (reduced rate) and "unbundled" (partial) representation.
- The author recommends that a centralized body in partnership with key public and private organizations could develop research, maintain an accessible database and disseminate findings in access to justice research.

Morris Rosenberg, "Preface" in *Expanding Horizons: Rethinking Access to Justice – Proceedings of a National Symposium* (Department of Justice Canada – Research and Statistics Division, 31 March 2000) at i. Online: Department of Justice Canada

<http://www.justice.gc.ca/eng/rp-pr/csi-sjc/jsp-sjp/op00_2-po00_2/op00_2.pdf>

Summary: This preface provides some preliminary thoughts on access and justice. In terms of access, the author emphasized that "[i]t is not enough to treat access as solely a matter of courts and formal legal proceedings." In terms of justice: "Justice is complex and multidimensional, and the justice process must provide more than formal, adversarial proceedings designed to find guilt or innocence, and winners and losers. In a sense, justice is no longer the exclusive preserve of the traditional justice system. If Canadian society is to develop effective and durable solutions to the problems that face us, our justice system will have to develop partnerships with communities and across disciplines and institutions."

Town Hall Meetings on Access to Justice: Report and Summary (Winnipeg: The Manitoba Bar Association, 2011). Online: The Manitoba Bar Association

<<http://www.cba.org/manitoba/main/PDF/Town%20Hall%20Meetings%20on%20Access%20to%20Justice%20Final%20Report%20and%20Summary.pdf>>.

Summary: This meeting identified recurring themes with respect to access to justice in Manitoba. It includes:

- Access to information
- Access to community based advocacy and legal support services
- Access to lawyers
- Access to Legal Aid
- Access to Courts
- Access to the criminal justice system
- Access to the family law system