

ACCESS TO JUSTICE: CLASSICAL APPROACHES AND NEW DIRECTIONS

INTRODUCTION

Around the world today, access to justice enjoys an energetic and passionate resurgence. It is an object both of scholarly inquiry and political contest, and both a social movement and a value commitment that motivates study and action. Though the recent resurgence makes much seem new, in fact access to justice has been a topic of policy advocacy and empirical research since the early 20th century (e.g., Smith, 1919). One legacy of early work is scholars' and practitioners' tendency to conceptualize access as a social problem that is faced by lower status groups, such as poor people. Another legacy is a penchant for reducing, in a whole variety of ways, questions of justice to matters of law. Given this orienting framework, classical access to justice research focuses heavily on empirically documenting how law falls short of its supposed promise. At the same time, classical research often relied on an expansion of law – more or more affordable lawyers, more or more welcoming courts and hearing tribunals, wider participation on juries, new and better rights – as *the* policy solution to injustice or inequality.

This volume heralds new directions in access to justice research. The chapters include cutting-edge work from scholars in law, political science, social psychology, sociology, and sociolinguistics. Their work reflects a high degree of sophistication in empirical analysis, and, as importantly, evidences a deeper engagement with social theory than past generations of scholarship. The richer conceptual frameworks employed by contemporary access scholars create more sophisticated research questions that in turn inform a more nuanced policy agenda. This research – on rights knowledge and police procedure, race and jury deliberation, tort reform and access to lawyers, self-interest and public service, ordinary people's experience with everyday troubles – reveals new discoveries about law and social process and provides foundation for a deeper understanding of access to justice that can inform wiser, more effective policies.

ACCESS TO JUSTICE

In distinct and complementary ways, each contribution moves access to justice research forward.

Among the most promising developments in contemporary access research is scholars' attention to the perspectives of the public and their experiences with justice on the ground. As Currie notes in his report on a recent large-scale survey of the Canadian public's experience with civil-law problems, "[s]o many aspects of ordinary daily activities are lived in the shadow of the law [that] it should not be at all surprising" that most of the population experiences significant problems "that have civil legal aspects" (this volume, p. 2). Civil justice problems are in many contemporary societies so common as to be "nearly normal features of everyday life" (Currie, this volume, p. 5 and Table 1). These often very mundane problems – with neighbors, merchants, government agencies, employers, or children's schools – can cause serious and wide-reaching consequences if not resolved, leading to additional justice problems, to the breakdown of relationships, to loss of employment or housing, to distrust of the legal system, and to impaired physical and mental health (Currie, this volume; Pleasence, Balmer, & Buck, 2006; Sandefur, 2008b). These problems are mostly not only for the people who experience them, but also for the broader community that may lose their active participation and which provides for social services, public benefits, and other kinds of support.

Though these problems have legal aspects, people often do not think of them as legal, and they show an enormous creativity in their search for solutions (Earl, this volume; Nader, 1980; Pleasence et al., 2006; Sandefur, 2007b, 2008a, 2008b). Rather than turning to courts or lawyers, people are much more likely to turn to elsewhere for help or to attempt to resolve problems on their own. People also often do nothing about problems that they nevertheless recognize and consider serious (Currie, this volume; see also Earl, this volume, and Sandefur, 2007b). For more than two-fifths of reported problems in Currie's Canadian study, people took no action at all or try to resolve them. When people did nothing, their most frequently reported reasons for doing so had little to do with the financial costs of possible actions; rather, people did nothing to try to resolve a problem because they were uncertain about their rights, thought that nothing could be done, or thought trying to resolve the problem would take too much time (*ibid.*, Table V; see also Pleasence et al., 2006; Sandefur, 2007b). Currie's work, by documenting the enormous scale and wide scope of public experience with civil justice problems, reveals "justice writ large ... not limited to the formal laws and system of justice, [rather] justice as a social institution" (Currie, this volume, p. 2).

The second chapter pushes further the frontiers of research on public experience with civil-law troubles, using a “seeming defect” of many civil justice surveys to produce new knowledge about the volume and severity of public experiences with them (Pleasence et al., this volume, p. 43). Civil justice surveys are typically retrospective, asking respondents to recall events that occurred in the past. Drawing on techniques for modeling people’s “forgetting curves” for life events, Pascoe Pleasence and his colleagues find that people are more likely to remember those problems that they believed were most important to resolve, that involved the most money, that caused the most adverse consequences in their lives, and for which they sought help. Overall, they find evidence that existing retrospective surveys substantially underestimate the frequency with which people encounter justice problems. For England and Wales, for example, they estimate that on the order of 2.7 times more serious and difficult to resolve civil-law problems occur than are reported. Respondents’ failures of autobiographical memory lead to biased estimates of both the incidence of different kinds of problems and of their severity. This bias is problematic not only for scholars interested in understanding, but also for governments trying to design civil justice policy. Researchers may someday move toward large-scale longitudinal surveys of public experience with justice problems, a methodological innovation what would overcome some of the limitations of current research. Today, working at the cutting edge of the state of the art, Pleasence and his colleagues provide a valuable tool for estimating the true incidence and severity of these troubles “at the intersection of civil law and everyday adversity” (Sandefur, 2007b, p. 113).

As legal realists observe, “as a practical matter, individuals have only the legal rights of which they are aware and which they can hope to enforce or use” (Daniels and Martin, this volume, p. 3). In an innovative empirical study of procedural rights consciousness, Kathryn Young explores Americans’ general knowledge about their constitutional rights in police searches and interrogations and how they use this knowledge to discern their rights in specific situations. Given the enormous amount of both fictional and factual media attention to crime and the police in the United States, Americans are unsurprisingly familiar with some of the “fundamentals of [US] criminal procedure,” such as Miranda warnings and a right to counsel for criminal defendants (Young, this volume, p. 81). However, “it is this very familiarity that may lead people to draw erroneous conclusions about their constitutional rights” (*ibid.*). From data collected through asking people to respond to vignettes describing common encounters between citizens and the police, Young identifies elements of a lay

jurisprudence of constitutional rights. This jurisprudence can lead people – with great confidence yet serious and consequential misunderstanding – to reason themselves out of exercising rights that they in fact possess. Young argues that the lay jurisprudence she discovers is more harmful than a simple lack of knowledge, concluding that “at least in some situations, citizens would be better off acting in complete ignorance of their procedural rights than trying” to use what knowledge they do have “to discern” their rights (Young, this volume, p. 83).

When poor people in the United States seek to exercise their rights, a substantial amount of the civil legal services available to assist them is provided through lawyers’ work in organized civil pro bono programs, in which individual lawyers or law firms donate their time to provide services (Sandefur, 2007a, 2009). Stephen Daniels and Joanne Martin argue that a “necessary consequence” of this “privatization of legal services for the poor” is an “ad hoc institutionalization” organized principally by lawyers’ and law firms’ “self-interest” (this volume, p. 147). Their analysis demonstrates that lawyers’ pro bono work is neither “free, nor purely charitable in nature. There is ... a market based on some exchange that distributes these resources. Demand does not drive th[is] market; ... the interests and priorities of those providing the resources” do so (Daniels and Martin, this volume, p. 149). These interests and priorities affect both which services will be provided and how they will be produced and delivered. The result is a civil legal aid system driven by provider, rather than consumer, interests.

Masayuki Murayama’s piece on legal services in Japan also explores how different models of legal services delivery may affect the public’s access. He argues that the Japanese market for private practice legal services is organized less by cost than by lawyers’ and citizens’ attempts to reduce their anxieties about each other. In comparative terms, Japan’s legal profession is small relative to the country’s population, about 1/20th the size of the United States’. While the United States has one lawyer for every 285 members of the public, Japan has one lawyer for every roughly 5,500 people (*ibid.*, p. 168). In many countries lawyers accept and, indeed, often solicit walk-in clients. In contrast, Japanese attorneys neither seek out nor “compete to obtain clients,” and are often unwilling to take on new ones unless they are referred by someone the lawyer already knows (*ibid.*, pp. 171–173). Citizens, in their turn, are anxious about whether lawyers will be willing to receive them. In this context, neither a citizen’s “general knowledge of the law,” nor her level of education, nor her income predicts whether someone who experiences civil-law problems will consult an attorney about them; rather, it is whether someone has “personal experience

and connections" with lawyers or courts that affects who takes their problems to lawyers (*ibid.*, p. 173). Rather than proposing to change the way this market operates, Murayama suggests a supplement to it: the expansion of existing legal advice centers. These centers, run by bar associations, provide relatively inexpensive, fixed-fee consultations to walk-in clients. By "allay[ing] people's discomfort" this additional means of matching potential clients to attorneys would, Murayama suggests, "open windows of the otherwise closed market of legal services" (*ibid.*, p. 194).

In a study of the impact of changes in law on access to lawyers, Mary Nell Trautner finds that personal injury lawyers alter the way they select from prospective cases not because of what a new law says, but rather in response to shifts in public opinion that they believe attend the legal change. In a number of countries, personal injury claims, sometimes called torts, are typically pursued in the context of contingent fee, or "no win, no fee" arrangements, in which a lawyer is paid out of the judgment or settlement from her client's case. When such lawyers lose a case, they not only do not get paid for their work, but are out-of-pocket for any expenses incurred preparing it for trial. Unsurprisingly, lawyers working in contingent fee arrangements select which cases to take and which to refuse with considerable care. In the United States, this segment of the legal services market has been reshaped in some states by the implementation of "tort reform." These legal changes have variously placed limits on the amount of money plaintiffs can recover in damages, on whom can be held liable for injuries, on the kinds of evidence that can be used to show harm and negligence, and on where and when such cases must be filed. In a creative vignette study of the impact of tort reform on how lawyers screen potential product liability cases, Trautner concludes that personal injury lawyers are responsive less to change in law per se than to "perceived changes in public attitudes and beliefs" (this volume, p. 226). "[T]ort reformers have been successful in linking corporations and victimhood in a narrative" that lawyers believe the public – who populates juries – had embraced. Reform thus encourages lawyers to shift their focus from considering whether potential clients can be construed as victims of negligent corporations to considering whether those same corporations will be seen by juries as victims of runaway tort claims (*ibid.*).

One of the challenges to justice in outcomes like trial verdicts and to equal participation in justice activities, such as jury service, is the fact that what looks like institutions' equal treatment of different groups can create unequal participation or unequal outcomes. Ng's chapter advocating for Spanish-language courtrooms and Rose's chapter on the sociology of the

jury both address this issue. In formal legal settings like courts, lay people often have difficulty figuring out how to communicate their wishes and needs in ways that court personnel understand (Conley & O'Barr, 1990; Sandefur, 2008a, pp. 346–352); this difficulty is compounded when lay people do not speak the language of the court. In the United States, Spanish speakers are the largest language minority, accounting for 96% of interpreter needs in federal courts (Ng, this volume, p. 102). Drawing on practices in the Canadian justice system, Kwai Ng proposes the limited use of Spanish-language courtrooms in which all personnel would communicate directly in Spanish during parts of the trial as a “pragmatic measure” to deal with the perennial shortage of qualified interpreters (*ibid.*, p. 115). Ng's approach, like Murayama's, is characteristic of the new policy-oriented access research, which takes not only people as they are but legal systems as they actually operate as the starting point for designing equalizing policies.

In her study of the race and the jury, Mary Rose identifies two puzzles of equal participation: the limited success of attempts to diversify jury pools and the ambiguous relationship between juries' racial make-up and the verdicts they produce. Despite government attempts to expand participation on juries, “race remains a good predictor of who serves and who does not serve, especially in the early stages of the jury selection process when courts” assemble the initial pool of people from which particular jurors are chosen for specific cases (Rose, this volume, p. 135). Rose argues that attempts to open up juries have not worked because both scholars and policy makers know very little about the reasons why people do not show up to serve. Rose observes that “if large numbers of people are simply not being ‘asked’ to serve on juries” then the remedy is to ask them. However, attrition from service likely reflects more complicated processes, such as the influence on potential jurors' behavior of neighborhood norms about deference to law and courts' inadequate compensation for the very real hardships, including “lost income [and] unsupervised children,” that can be imposed by jury service (*ibid.*, p. 129). If these are the reasons people do not serve, educational outreach and tougher summons enforcement will not be sufficient; rather, government must “invest more resources [to support jury service] so that the state demonstrates the same commitment that it asks from its citizens” (*ibid.*).

Rose shows that it remains unclear how racial representation on juries affects the outcome of trials. Research suggests that jury composition affects *how* juries deliberate, but so far has documented a much less clear relationship between racial composition and *what* juries decide. “Greater racial diversity on juries seems ... to alter the entire context in which individual

jurors hear evidence, think about issues, arrive at their own tentative conclusions, and imagine presenting their opinions to others" (*ibid.*, p. 134). At the same time, however, few studies find evidence that racial composition affects the final verdicts that juries produce. This finding does not mean that racial representation is irrelevant to justice, but rather we have yet to understand how race and racial diversity work in group deliberation. With respect to this puzzle, the literature has come to a dead end; to resolve it, research on juries needs to rethink the process at issue. In particular, Rose concludes, scholars need to move beyond documenting individuals' attitudes and judgments to look more carefully at group deliberation. Rose's engagement with core questions in social psychology opens up a new direction in jury research and, if policy makers are attentive, in justice policy.

A similar engagement with deep questions and common themes across subdisciplines motivates Jennifer Earl's call for a new sociology of troubles. Earl observes that many subfields study people's experiences with trouble – the literatures on social movements, social problems, industrial relations, and organizational conflict, for example – yet each approaches that study with little reference to the other, "breaking trouble up by forms of redress and researching those forms of redress in isolation" (this volume, p. 232). Thus, we have empirical research about whether disputes with neighbors are taken to law or not, or whether people who experience environmental catastrophes join social movements or not, or how driving while intoxicated comes to be seen as a social problem worthy of public attention, but little research that speaks to the fascinating questions of which kinds of troubles call forth which kinds of responses, or how people choose between forms of redress, or why the most common response to many troubles, in every subfield that studies them, is doing nothing at all. Earl calls for an integration of these subfields around their common interest, in troubles, an intellectual shift that would permit scholars to answer these broader questions.

The volume closes with a comment from Bryant Garth, who early in his distinguished career led a generation of access to justice research that combined visionary idealism with critical empirical analysis. Garth importantly reminds scholars and practitioners of the centrality of power and power relationships in any analysis of law, a centrality that is often obscured in the contemporary access to justice movements of both more and less developed nations. In the former, today's public conversations about access often rely on individual volunteerism and lawyers' pro bono service as a remedy to systemic problems like poverty, violence, racism, or gender inequality; in the latter, international development initiatives promote a rule of law that draws heavily on a rights model, particularly a model that

privileges property rights. Both at home and abroad, Garth argues, "the key to advancement of any access to justice agenda ... is its relationship to critical scholarship informed by the theories and methods of social science, especially sociology," for "[l]aw without the sociology of law easily slips into the reiteration of legitimating rhetoric" (Garth, this volume, p. 258).

Classical access to justice research was often highly compelling, but it was also often very myopic. Its narrow vision has shaped both understanding and practice, leading scholars to produce research that goes no further than documenting that law betrays someone's ideals, leading lawyers and others "to think that" the only good solutions "to social problems" are "legal solutions," and encouraging practitioners, researchers, and opinion leaders to join in a chorus of "simplistic exhortations" about the importance of fulfilling "the unmet legal needs of ... vague categories" of people, like the disadvantaged (Garth, this volume, p. 258; see also, Abel, 1985; Galanter, 1974; Genn, 1993; Mayhew, 1975; Marks, 1976; Sandefur, 2008a, 2008b).

New, more promising directions in access to justice research are reflected in this volume. Scholars and practitioners both must step back from law to understand justice. They must do so empirically, by examining law's antecedents, complements, and alternatives, and conceptually, by drawing on the rich theories provided by the social sciences. Access researchers are almost always motivated by a wish to improve the world. Consequently, their interests include the application of their research insights in practice. They must strive for the same analytic clarity and methodological sophistication that characterizes the best pure research. Good understanding is valuable both for its own sake and because it is essential to good policy.

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Rebecca L. Sandefur
Editor