LOOKING FOR QUALITY: THE EMPIRICAL DEBATE IN ACCESS TO JUSTICE RESEARCH

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Access to Justice remains one of the most contested issues on the law-and-society agenda. There has been continuing conceptual debate over its meaning, its objectives, and its success. Of late, attention has turned to efforts to measure the impact and efficacy of different initiatives aimed at improving individuals' access to justice. Along with a broader turn toward empirical studies in law, there have been renewed efforts within the access to justice field to develop a more compelling and convincing methodology by which to assess and evaluate these different initiatives.

L'accès à la justice demeure l'une des questions les plus contestées à l'ordre du jour « droit et société ». Il y a un débat conceptuel continu au sujet de son sens, de ses objectifs et de son succès. Récemment, l'attention s'est tournée vers les efforts visant à mesurer l'impact et l'efficacité de différentes initiatives ayant pour but d'améliorer l'accès à la justice des particuliers. Outre une tendance plus générale vers des études empiriques en droit, il y a eu, dans le domaine de l'accès à la justice, des efforts renouvelés visant à élaborer une méthodologie plus contraignante et convaincante pour évaluer ces différentes initiatives.

I. INTRODUCTION

Access to Justice remains one of the most contested issues on the law-and-society agenda. There has been continuing conceptual debate over its meaning, its objectives, and its success. Of late, attention has turned to efforts to measure the impact and efficacy of different initiatives aimed at improving individuals' access to justice. Along with a broader turn toward empirical studies in law, there have been renewed efforts within the access to justice field to develop a more compelling and convincing methodology by which to assess and evaluate these different initiatives. A tension has arisen between quantitative and qualitative approaches; this is typically framed within the context of how initiatives are evaluated for the purposes of research. However, beneath that seemingly technical project, there is a deeper and more basic policy debate about the overall ambitions for access to justice – is the goal to improve people's access to the legal process (through legal representation or an equivalent form of legal services) so as to increase their chances of achieving a more positive outcome (the practical thesis) or is it so as to enhance their participation and ultimately their ability to affect justice as an end in itself (the democratic thesis¹)?

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One area in which these debates arise is that of civil law self-help centres. In self-help (or pro se) law centres, lawyers offer limited assistance to litigants (on a pro bono basis) so that they can do a better job of representing themselves in civil matters. The efforts to gauge the success of this initiative have encompassed both empirical and conceptual analysis as well as reference to the practical and democratic theses. As such, the work devoted to assessing the validity and viability of self-help law centres provides an important site at which to discuss access to justice theory and objectives. Moreover, there are significant policy implications to be drawn from such work.

The purpose of this paper is to canvass certain recent empirical quantitative work and relate it to the broader challenges and ambitions of the practical and democratic theses in terms of a policy agenda for access to justice. I will begin by framing the debate in and around access to justice as it applies to the work of civil law self-help centres and their mandate to assist self-represented litigants. Next, I will introduce the two research streams that have arisen in access to justice research namely, (1) the qualitative and related observational work; and (2) the more recent quantitative studies that seek to use randomized methods in an attempt to measure outcomes. In the next section, the paper will discuss critically and in more depth some of the concerns associated with a focus on legal outcomes and corresponding adoption of a randomized quantitative methodology. I will concentrate on the practical, theoretical and ethical issues raised by these studies.

Finally, I will advocate for the continuing need for more in-depth qualitative research that examines the experiences, views and perceptions of individuals engaged with the civil justice system. This is based on the belief that qualitative research, which takes account of the individual's experiences attempting to access justice, creates a space in which to think and debate meaningful participation. Indeed, I contend that this form of qualitative research is consistent with an expanded concept of access to justice that contemplates policies and initiatives that encourage democratic participation and citizen engagement. In so doing, my hope is not only to expand discussion of the broader objectives respecting access to justice, but also to learn from some of the criticisms that have been leveled against earlier qualitative and observational studies in access to justice. Throughout the paper, my critical ambition is to relate the empirical debate back to the more fundamental discussion over the tension between the practical and democratic theses as a basis for access to justice theory and policy.

II. ACCESS TO JUSTICE AND SELF-HELP LAW CENTRES

Within access to justice research, there remains a central tension over the nature of access – should it involve more access to members of the legal profession or, alternatively, should it focus on initiatives that assist individuals to participate more directly themselves in the legal institutions that impact their lives?² While the former is a more traditional approach, the latter is of more recent origin and is based on a different set of values. This latter approach is situated in a broader conceptualization of access,

¹ In her article entitled “Processes of Constructing (No) Access to Justice (For Ordinary People)”, Laura Nader questions whether the gap caused by much legal advice and assistance to the few and too little for the many undermines the legitimacy of the institutions of democratic self-government?, (1990) 10 *Windsor YB Access Just* 496 at 508.

² Roderick MacDonald, “Access to Justice and Law Reform #2” (2001) 19 *Windsor YB Access Just* 317 at 320 (MacDonald, “Access to Justice”). Moreover, MacDonald questions whether access is conflated with justice such that it is assumed that greater access will promote justice.

which incorporates ideas about participation and the democratization of knowledge³; these ideas are also ultimately linked to the continued legitimacy of the legal system.⁴ This concept of access to justice encompasses the means to participate in the legal and political processes that determine law.⁵ However, this approach faces certain challenges.

Specifically, within the context of self-help initiatives, there are concerns that a broader conceptualization of access places a heavier burden on self-represented litigants to participate actively in their case. This acts as a substitute for legal representation and, as such, represents a form of abandonment of self-represented litigants who require legal assistance. Moreover, this approach fails to take account of the professionalization of law that often necessitates the need for full legal representation.⁶ Recent initiatives to develop and monitor the utility of self-help legal services are inevitably drawn into discussions about these challenges given that individuals are obligated to participate directly in the legal processes that affect them.

Civil law self-help centres have emerged as a response to the growing number of individuals compelled to represent themselves when engaged in civil law matters. Self-help programs may include telephone hotlines, online assistance with court forms and processes, self-help centres, and duty counsel. While the self-help model varies, self-help centres are typically staffed by volunteer lawyers who provide summary legal advice and information to self-represented litigants on a 'first-come, first-served' basis. The volunteer lawyer does not assume carriage of the matter on behalf of the self-represented litigant; it is assumed that the self-represented litigant will continue to manage his or her own file as it moves through the civil justice system. In so doing, the self-represented litigant can re-attend at the self-help centre as often as necessary to obtain additional advice or information relevant to the particular stage of their legal matter.

One of the strongest criticisms respecting this initiative involves the effectiveness of self-help in certain cases and in respect of certain clients. It is contended that summary legal advice to self-represented litigants may not be suitable where the individual lacks power (and there is significant power opposing the litigant) and/or where the legal interest at stake in the case is recognized as being significant or life-altering.⁷ The conclusion drawn is that there will be certain circumstances where full legal representation is not only appropriate, but necessary.⁸ In these circumstances, the question that arises is how such traditional legal representation might be reconciled with a broader conceptualization of access that contemplates meaningful participation and engagement by the individual litigant.

Although self-help law centres are characterized as part of a more democratic imperative, there is also a contradictory characterization that raises difficult questions about the underlying motivations associated with the development of self-help programs. Viewed through a neoliberal lens, there is a

³ Janice Gross Stein & A Cook, "Speaking the Language of Justice: A New Vernacular" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century-The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 163 at 170.

⁴ *Ibid* at 170.

⁵ Gary Blasi, "How Much Access? How Much Justice?" (2004-2005) 73 *Fordham L Rev* 865 at 878.

⁶ Nourit Zimmerman & Tom R Tyler, "Between Access to Counsel and Access to Justice: A Psychological Perspective" (2010) 37 *Fordham Urb LJ* 473.

⁷ Russell Engler, "Connecting Self-Representation to Civil Gideon: What Existing Data Reveals about when Counsel is Most Needed" (2010) 37 *Fordham Urb LJ* 1 at 9.

⁸ As an example, see *New Brunswick (Ministry of Health and Community Services) v. G (J)*, [1999] 3 *SCR* 46.

question of whether such programs are more reflective of the move toward the dismantling of social welfare whereby self-reliance is synonymous with a 'hollowed-out state' that does not provide adequate safety nets for its citizens.⁹ In this regard, self-help represents a shift in responsibility from government and the legal profession back to individuals who cannot afford counsel. The result is that the self-represented litigant's participation is shallow at best and the democratic nature of the imperative is undermined.

Coupled with a concern that increased participation flowing from self-help is at best shallow, there is an additional concern that the existing legal processes and institutions are neither designed for nor accommodating of participation by self-represented litigants. Therefore, these individuals are unable and/or unlikely to engage meaningfully in the decisions that affect their lives. Looked at in this light, rather than being a form of empowerment for self-represented litigants, self-help is considered to be a form of disempowerment. By providing self-represented litigants with legal information and expecting them to 'act as a lawyer' in their own case, the individual is trained to participate in the traditional legal system in a pseudo-legal capacity. Armed with limited knowledge and advice, the individuals are expected to 'go it alone' in a legal system that does not speak the same language and, in many instances, is not prepared to deal with them.¹⁰ As a result, self-represented litigants who have appeared in court on their own often express anxiety, frustration and powerless when dealing with matters in court.¹¹

Consequently, self-help raises significant questions about self-represented litigants' ability to assert rights, fulfill responsibilities, and engage directly with the law in an effective and realistic manner. More specifically, self-help law centres raise concerns that are grounded in the practical realities associated with the non-lawyer's capacity to participate in a complex and professionalized legal system and to rely on and utilize the legal knowledge provided to them. Notwithstanding a continued adherence to the idea of 'having one's day in court', the mystification of law has necessitated the need for professional legal representation in order to 'have one's day.'¹² At the heart of this inquiry are concerns about whether this form of legal assistance simply provides the self-represented litigant with the tools to reframe their 'meaning of the event' within a technical legal framework over which they lack control and from which they ultimately feel disengaged.¹³ This is further complicated by the concern that this initiative represents an abdication of responsibility by both the legal profession and government respecting the needs of many litigants who cannot afford legal services.

As a relatively new initiative in Canada, the pertinent questions that arise from this critical commentary are - what role does or should self-help play in assisting self-represented litigants participate directly in certain legal processes? and what are the implications of this for the democratic thesis?¹⁴

⁹ Henry A Giroux, *The Terror of Neoliberalism: Authoritarianism and the Eclipse of Democracy* (Boulder, CO: Paradigm Publishers, 2004) at 106.

¹⁰ Elizabeth McCulloch, "Let me Show You How: Pro Se Divorce Courses and Client Power" (1996) 48 Fla L Rev 481.

¹¹ Julie MacFarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" Final Report (May 2013). Online <<http://www.representing.yourself.com/pdf/reportM15/pdf>>.

¹² Zimmerman & Tyler, *supra* note 6 at 477.

¹³ Sally E Merry, *Getting Justice and Getting Even* (Chicago: University of Chicago Press, 1990), at 10.

¹⁴ The aim of my larger research project (which this essay touches upon), therefore, is to examine the relationship between self-help and access to justice; including what impact this assistance has on the self-represented litigants' perceptions about access to the civil justice system and willingness to participate further in the system.

III. PARTICIPATION IN A LEGAL CONTEXT

Underlying these questions are assumptions that litigants' understanding of law including legal processes, experiences in law and expectations of fairness affect their legal engagement.¹⁵ These experiences, perceptions and expectations can be determinative of whether they 'turn' to law and/or continue to engage with law-making and law-administering processes that form the basis of the modern political authority.¹⁶ Within a broader theoretical framework of access, direct participation will go hand in hand with the democratization of legal knowledge so that citizens' direct engagement in legal processes and institutions is reflective of the "living law of everyday human activity".¹⁷

Consistent with a concept of 'strong democracy', meaningful participation allows citizens to move away from reliance on experts and toward wider and more frequent participation in a variety of legal and political forums such that decisions ultimately reached are reflective of the citizens' own understanding of law and views about justice.¹⁸ Access to justice as a goal that promotes and provides for meaningful engagement by its citizens further allows individuals to participate directly in defining their own conceptualizations of justice. In this regard, access to justice that promotes meaningful participation can potentially enhance social, political and economic forms of justice in society consistent with democratic values and principles. Of course, this theoretical framework entails a commitment to the democratic thesis and a broad involvement by all citizens so that the resulting conceptualizations of justice are reflective of all of the citizenry.

Within this more democratic approach, the question arises about the role that legal institutions play in the promotion of meaningful participation? In a legal context, the practice and administration of law should be influenced by the presumption that individuals are equally qualified to have a say in the disputes that affect them and should engage in the decision-making processes.¹⁹ Thus, in accordance with a democratic approach to lawyering, the lawyer and the client will work together in a collaborative effort to affect certain results.²⁰ This active engagement in the process by clients reflects a participatory approach to legal decision-making in which the individual, equipped with legal knowledge, is able to engage directly in the processes that affect them. Clients would not only decide on strategies to be pursued, but would also engage in and implement those strategies. As a result, there would be a shift in the nature of the lawyer-client relationship such that lawyers assume more the role of agents, and clients assume more autonomy in the decision-making associated with their legal matter.

While the result may not be that the client is in a position to assume carriage of the matter without the support of counsel, there is arguably an indirect benefit associated with demystifying legal processes: individuals will be able to engage more effectively with these demystified processes. Moreover, by

¹⁵ Ellen Berrey, Steve G Hoffman & Laura B Nielsen, "Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation" (2012) 46:1 Law & Soc'y Rev 1 at 7.

¹⁶ Mathieu Deflem, *Sociology of Law* (Cambridge, UK: Cambridge University Press, 2008) at 37.

¹⁷ Berrey, Hoffman & Nielsen *supra* note 14 at 6; MacDonald, "Access to Justice", *supra* note 2 at 319.

¹⁸ Allan C Hutchinson, *The Province of Jurisprudence Democratized* (New York: Oxford University Press, 2009) at 199. This implies that the conceptualizations of justice that result from this wide and frequent participation reflect some consensus among the citizenry rather than the views of particular individuals better equipped to articulate their views than others.

¹⁹ Asciano Piomelli, "The Democratic Roots of Collaborative Lawyering" (2006) 12 Clinical L Rev 541 at 600.

²⁰ *Ibid.*

engaging the individual in the decision-making processes (particularly when those processes directly impact his or her life) and providing them with an opportunity to influence the decision, individuals will become invested in the process and thus less likely to feel disempowered about decisions that impact their life.²¹ In other words, this re-conceptualization of the lawyer-client relationship expands the spheres in which the individual is able to have a say about the decisions that impact their own lives and this is consistent with the values underlying participatory democracy. In a broader political context, the participatory mode of democracy contemplates an ongoing process through which citizens are engaged in critical, collaborative and collective debate and action that enables them to “be active in the (re)formulation of substantive visions about what good lives might comprise.”²²

Working within a theoretical framework that engages a democratic approach to lawyering, qualitative research seeks to examine how self-represented litigants’ views and perceptions about their ongoing ability to engage with legal processes and institutions are formed as a result of their particular interaction with the legal system.²³ In this regard, it is assumed that an individual’s understanding of law and expectations of fairness when involved with legal processes will potentially impact their future legal and political engagement. Thus, qualitative research including in-depth interviews, case studies and observation can be used to gather data regarding individuals’ ‘lived experiences’ with law, the meaning they assign to these experiences and the implications for their further engagement with law.

In a litigation context, the individual’s ability to tell her story as well as present evidence to the adjudicator both become important criteria by which a litigant assesses the fairness of the legal proceeding. The significance of these criteria is supported by research that has been conducted in respect of procedural justice and the importance of process-versus-outcomes to a litigant when assessing the overall fairness of a legal process.²⁴ In this context, the values associated with evaluating the procedural fairness of a process extend beyond the technical legal and procedural rules used within a particular legal setting; they also include elements of natural justice such as the right to be heard, the exclusion of bias, and a determination that reflects the ‘evidence’ presented.

In seeking out the self-represented litigants’ experiences with different forms of legal assistance (such as self-help), it is also important to take account of some of the themes raised in research on legal consciousness and how a litigant’s legal consciousness both informs and is altered by her particular legal experiences. Research on legal consciousness focuses on the role that law plays in constructing meaning,

²¹ In her study involving the implications for legal consciousness of welfare recipients involved in disputes, Lucie White noted that even as a poverty lawyer attempting to assist welfare recipients who had been unfairly penalized or accused of welfare fraud, the inclination as a lawyer was to frame the legal issue from her own perspective which, at times, was in stark contrast to the wishes of the individual client. The client’s understanding of law involved distrust of authorities, skepticism regarding the fairness of the process and a belief that the decision-makers could not possibly understand her context. The result of this disconnect was less than optimum representation and a confirmation by the client that she was not part of the system. Lucie E White, “Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.” (1990) 38:1 Buff L Rev 1.

²² Hutchinson, *supra* note 18 at 199; Benjamin R Barber, *Strong Democracy: Participatory Politics for a New Age* (Oakland, CA: University of California Press, 1984) at 132.

²³ Berrey, Hoffman & Nielsen, *supra* note 15 at 6.

²⁴ Specifically, the social psychology research that has been conducted in the field of procedural justice examines how individuals weigh the quality of the procedures afforded them in different legal contexts and ultimately assess the fairness of a given process. See Martin Gramatikov, Maurits Barendrecht & Jin Ho Verdenschot, “Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology” (2011) 3 Hague Journal on the Rule of Law 349 at 361.

affecting actions and shaping various aspects of social life.²⁵ Thus, studies involving legal consciousness explore ways in which knowledge about and/or experience with law (and legal institutions) affects the meaning people give to law (and the role of law in people's life) and how this meaning may translate in to further action.²⁶

Previous research²⁷ has examined when individuals consider law as a viable option to resolve their problems and when they in fact 'turn' to law. Having 'turned to law' to resolve their problems (with assistance of a service such as self-help), there is a further need to examine whether they believe they are subsequently better or worse able to engage with legal processes and institutions in the future. In other words, having directly participated in a legal process, it is important to understand how individuals' experiences in the civil justice system and resulting perceptions about their ability to participate might impact their future engagement. Underlying this approach to access to justice research is the democratic thesis: this thesis values enhanced and meaningful participation by all citizens within a variety of legal and political forums.

This approach can be contrasted with the more recent quantitative, randomized and results-based methodological approach to research. This methodology seeks to generate data by attempting to measure the impact of legal representation and/or other comparable legal services within a particular legal context using measurable legal outcomes in individual cases. In terms of access to justice initiatives, research that measures the impact of a specific legal service on the legal outcome achieved arguably helps to define when full legal representation is needed to achieve a particular outcome and when something less than full legal representation can be provided to self-represented litigants. In this regard, quantitative data may be used to rationalize budgetary cutbacks of initiatives that are not 'proven' to generate certain outcomes or as a basis for suggesting that a lesser service would achieve the same results. However, caution must be exercised as research should not be driven by questions that fit 'policy-makers' definition of a problem and their policy goals for addressing that problem."²⁸

In light of this focus on quantitative data, the call for 'hard data' as a basis for developing and maintaining access to justice initiatives gets louder. This has worked to effect a corresponding downgrading of the value of qualitative research. Specifically, the focus on self-represented litigants' experiences and perceptions about their engagement with the civil justice system is relegated to the status of 'customer satisfaction surveys'. While this paper does not negate the need for full legal representation in certain situations and the associated need for research that assists in delineating those

²⁵ Laura Beth Nielsen, "Attitudes of Ordinary Citizens about Law and Street Harassment" (2000) 34:4 Law & Soc'y Rev 1056 at 1059.

²⁶ *Ibid.*

²⁷ See for e.g., research conducted by researchers such as Austin Sarat, Lucie White, Susan Silbey, Patricia Ewing, Laura Beth Nielsen and Sally Merry (and most recently Michael Trebilcock, Anthony Duggan and Lorne Sossin in the Canadian context) See Patricia Ewick & Susan B Silbey, *The Common Place of Law* (Chicago, The University of Chicago Press: 1998); Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans*, (Chicago, The University of Chicago Press: 1990); Lucie E White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G" (1990) 38(1) Buffalo Law Review 1; Austin Sarat & William LF Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process*; Laura Beth Nielsen, "Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment" (2000) 34 Law & Society Review 1055.

²⁸ Catherine R Albiston & Rebecca L Sandefur, "Expanding the Empirical Study of Access to Justice" (2013) Wis L Rev 101 at 104.

situations, there are practical, theoretical and ethical concerns that arise in shifting the focus from qualitative research to randomized outcome-based quantitative research. Accordingly, the latter half of this paper argues that qualitative research that concentrates on the self-represented litigants' experiences, views and perceptions must be an integral part of a broader conceptualization of access to justice that seeks to promote the democratic virtues of participation and engagement.

IV. EMPIRICAL RESEARCH ON ACCESS TO JUSTICE

A significant portion of the recent research conducted in the field of access to justice has focused on the impact of legal representation (or lack thereof) on case outcomes.²⁹ Within this research stream, outcomes have generally been defined as a positive result in the particular case type (such as a greater monetary award or the avoidance of an eviction) or other defined 'win' in a purely legal context. More recently, this approach to research has expanded to other forms of legal services that run a spectrum from legal clinics and duty counsel programs to initiatives that distribute legal pamphlets and provide information online about various court forms. Historically, research in this area has involved observational studies that purport to study the impact of legal services in a variety of different settings.³⁰ Typically, these projects have included a combination of observations of various adversarial processes, interviews with stakeholders (including lawyers, judges, court clerks and self-represented litigants), surveys, case studies, reviews of court records and a meta-analysis of other outcome-based studies.³¹

For the purposes of this paper, research regarding outcomes can be divided into two broad categories, namely; (1) research that examines the outcomes achieved by self-represented litigants who do not have counsel versus those individuals who have counsel; (2) research that compares a spectrum of legal services whereby individuals receive some legal assistance that falls short of full representation. Examples of legal services that fall into the second category include self-help centres, duty counsel, hotlines and legal education programs. Both of these broad categories reflect a focus on evaluating the impact of legal services and the efficacy of a particular access to justice initiative in affecting positive outcomes for clients. In certain respects, both categories are aimed at assessing the effectiveness of a service in a particular legal setting. Importantly, the 'effectiveness' of a program is measured in terms of the objective legal outcome achieved in the case.

²⁹ Herbert M Kritzer, "To Lawyer or Not to Lawyer: Is that the Question?" (2008) 5:4 J Empirical Leg Stud 875.

³⁰ D James Greiner & Cassandra Wolos Pattanyak, "Randomized Evaluation in Legal Assistance: What Difference does Representation Make (Offer and Actual Use) Make?" (2011) 121 Yale LJ, online: SSRN <http://papers.ssrn.com/so13/papers.cfm?abstract_id=1708664> at 49-56. The authors provide an exhaustive review of the various studies that have been conducted to date.

³¹ For an example of meta-analysis, see Rebecca L Sandefur, "The Impact of Counsel: An Analysis of Empirical Evidence" (2010) 9:1 Seattle Journal for Social Justice 51 as well as research by Jessica Steinberg, Michael Milleman and Jeff Gidding regarding examples of other methods of inquiry. See Jeff Giddings & Michael Robertson, "Lay People, For God's Sake! Surely I Should Be Dealing with Lawyers? Toward an assessment of Self-Help Legal Services in Australia" (2002) 11 (2) Griffiths Law Review 436; Michael Milleman, Nathalie Gilfrich & Richard Granat, "Rethinking the Full-Service Legal Representation Model: A Maryland Experiment" (1997) Clearinghouse Review 1178; Jessica K Steinberg, "In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services" (2010-2011) 18 Geo J on Poverty L & Pol'y 453.

In contrast to this approach, there are legal researchers working in the field of access to justice who have adopted qualitative methods (including ethnographic methods) borrowed from the social sciences as a means of examining individuals' experiences within the civil justice system, their legal consciousness, and perceptions about law more generally.³² Typically, the objective in this type of research is to collect narratives and/or information from individuals in order to "discover the different ways in which people use and think about law" and what that means for access to justice going forward.³³ This work examines the way in which individuals characterize, address and respond to civil justice problems without traditional legal representation. One of the validating bases for conducting research in this manner is to engage in a broader discussion about what role law plays in citizens' lives and what role it should play.

The research that engages the views and perceptions of self-represented litigants through methods such as observation and in-depth interviews has recently come under attack. The main thrust of the attack is that the solicitation of clients' viewpoints does not provide evidence of the efficacy of a particular legal service (in terms of a correlation between the service provided and the self-represented litigant's ability to affect a particular result). Furthermore, it is argued that this methodological approach does not address whether the client is in a position to make use of the assistance provided in order to obtain a successful outcome. In this regard, surveys and interviews reflect the client's level of 'customer satisfaction' with a particular service, but offer only limited insight into the effectiveness of an initiative in relation to specified goals.³⁴ This critique is bolstered when the legal service being studied is something less than full legal representation. In these particular circumstances, there is an added concern that surveying clients who might otherwise not receive any legal assistance provides a distorted picture of the efficacy of the particular initiative: the interviewees are likely to be overly positive about any assistance that they receive. This criticism applies notwithstanding the actual outcome obtained or the objective quality of the service provided. Finally, there is a concern that the self-represented litigant (as a layperson with little or no experience with lawyers) is not in the best position to assess critically the services provided.

What is important to note about these criticisms is their underlying insistence that a focus on case outcomes (i.e., the legal result reached in a particular case) is necessary to establish an accurate measure of the quality and/or efficacy of a particular access to justice initiative. In this regard, some scholars contend that research on access to justice should attempt to provide "definitive evidence" and/or a "quantification of the benefit of advice or representation" about a particular access to justice initiative.³⁵

However, the resulting focus on case outcomes as a measure of the effectiveness of an access to justice initiative raises deeper challenges. These include questions about what the broader objectives of

³² See for e.g., research undertaken by Hazel Genn, Sally Merry, William O'Barr and John Conley, Patricia Ewick, Susan Silbey and Ingrid Eagly. Hazel Genn, *The Paths to Justice* (Oxford UK: Hart, 1997); Merry, *supra* note 13; Patricia Ewick & Susan Silbey, *The Common Place of Law – Stories from Everyday Life*, (Chicago: University of Chicago Press, 1990); William O'Barr & John M Conley, "Litigant Satisfaction versus Legal Adequacy in Small Claim Court Narratives" (1985) 19 Law & Soc'y Rev 661; and Ingrid Eagly, "Community Education: Creating a New Version of Legal Services Practice" (1997-98) 4 Clinical L Rev 433.

³³ Ewick & Silbey, *ibid* at xi.

³⁴ Laura K Abel, "Evidence-Based Access to Justice" (2009-2010) 13 U Pa J L & Soc Change 295 at 297-303.

³⁵ *Ibid* at 303, Pascoe Pleasance, *Trial and Tribulations: Conducting Randomized Experiments in a Socio-Legal Setting*, (Oxford, UK: Blackwell, 2008) at 11

access to justice theory are and how such objectives should be articulated in access to justice policy and initiatives. Moreover, broader theoretical considerations about what access to justice seeks to provide access to, as well as practical and ethical issues concerning case outcome research (as a means of obtaining the ‘quantification of benefits’) suggest that there are valid reasons for guarding against a shift that is too heavily focused on case outcome research. Instead, it is important to continue to incorporate a variety of methodologies that, at a minimum, encourage ongoing discussion about how access to justice should be conceptualized and optimally are consistent with and support a broad conceptualization of access to justice goals, particularly as it pertains to advancing democratic values and interests.

V. RANDOMIZED OUTCOME-BASED RESEARCH

Randomized testing has typically not been the standard practice in legal representation research: many studies have sought evidence about the efficacy of a particular service through methods such as observation, surveys, interviews with various stakeholders as well as case-file reviews but these methods have not generally involved randomization. The underlying motivation in much of this research has been to understand better the impact that legal representation (and/or some form of legal services) has on an individual’s case.³⁶ However, due to the number of factors that potentially influence any given outcome, there are challenges involved in making generalizations about the impact of a particular access to justice initiative on outcomes. Moreover, it is noted that the studies that compare the outcomes of cases in which there was legal representation with outcomes where there was no representation are fatally flawed from a methodological perspective.³⁷ Therefore, it is maintained that, “the use of comparisons and control groups are the best empirical method for isolating the effectiveness of a particular intervention while excluding other explanations for the intervention’s claimed effects.”³⁸ Together with a focus on evaluations that examine the “sort of difference a service makes,”³⁹ these critical notices have led to a shift in methodological alignment in access to justice research supported by a belief that ‘hard data’ can assist in making difficult policy decisions about access to justice initiatives. That said, while containing useful cautions, these hard data criticisms should not have the effect of excluding or marginalizing other forms of research.

In the context of assessing access to justice, randomized studies create two similar groups (a treated group and a control group). The claim is that it is possible to compare the impact of legal services on outcomes achieved when the service is offered or provided to a treated group and not offered and/or provided to a control group of clients. By also controlling for a collection of variables that may potentially impact the outcome of the case, randomized studies insist that it is possible to measure the impact that a particular legal service has on the outcome achieved in a specific legal setting.

³⁶ Greiner & Pattanyak, *supra* note 30, at 18.

³⁷ *Ibid* at 7

³⁸ Abel, *supra* note 32, at 299.

³⁹ Liz Curran, “A Literature Review: Examining the literature on how to measure the ‘successful outcomes’: quality, effectiveness and efficiency of Legal Assistance Services” (February 2012) online: Attorney General, Government of Australia <www.ag.gov.au/LegalSystem/Legalaidprograms/Documents/literature/20review20of/20legal/20-assistance/20by/20Dr/20Liz/20Curran.pdf> at 14.

While there are a small number of studies that have pursued randomized research, I will concentrate on one recent and prominent example from Harvard Law School: it serves as a focal point for a critical discussion about research methodologies in access to justice research.⁴⁰ In this study, one of James Greiner and Cassandra Pattanyak's arguments is that earlier observational studies "suffer from methodological problems so severe as to render their conclusions untrustworthy."⁴¹ They suggest that these earlier studies may provide 'rich descriptive' information about self-represented litigants, but it is not possible to "draw inferences on causation regarding the effects of offers or actual use of representation" from the descriptive information collected due to various methodological shortcomings in the structure of the various studies.⁴² Greiner and Pattanyak contend that there are three main methodological problems in the earlier observational studies - a failure to define the intervention that is being examined; a failure to account for selection effects; and a failure to adhere to standard principles of statistics that account for uncertainties within the study.⁴³

These criticisms of earlier access to justice research arose in the context of a research project that Greiner and Pattanyak undertook at Harvard Law School. They conducted a randomized study in the field of access to justice.⁴⁴ In their study, the researchers sought to measure the impact of an offer of representation from law students working at the Harvard Law Aid Bureau (HLAB): this is a student-run, faculty-supervised legal clinic connected with the clinical law program at Harvard Law School. Potential clients consisted of claimants who were seeking to appeal a denial of certain unemployment insurance benefits. Upon contacting the clinic for assistance, the claimants were subjected to the usual intake interview respecting their case and their consent to participate in the evaluation was obtained.⁴⁵ Following this process and assuming that the individual qualified for assistance at the clinic, the individual's information was sent to the researchers; they randomized the case and instructed HLAB whether to offer the individual assistance. Within the treated and control groups, the researchers attempted to account for gender, education, race as well as the length of time the legal matter had been ongoing. The treated group was offered assistance from the clinic while the control group was not offered assistance. At this stage, it is important to note that the relevant variable that the research sought to isolate was the impact of an offer of representation from the Legal Aid Bureau. The research did not randomize the participants on the basis of actual representation provided or withheld.

Accordingly, the study did not purport to evaluate the quality of the legal services provided. It restricted itself to determining simply whether an offer of assistance (and use of representation) had a positive impact on the ultimate outcome obtained by the claimant (as measured by the pecuniary award

⁴⁰ Greiner & Pattanyak, *supra* note 30.

⁴¹ *Ibid* at 7.

⁴² *Ibid*.

⁴³ *Ibid* at 56-57.

⁴⁴ In focusing on the studies conducted at Harvard Law School, I am starting from the position that the methodology and results achieved are statistically valid. It seems appropriate here to caution that I do not have any formal or sustained background in statistics and, therefore, do not purport to pass judgment on the technical or scientific aspects of their methodology.

⁴⁵ Upon attending at the clinic, the potential clients were verbally advised that HLAB was conducting an evaluation of the service and were also read a script about the study before being asked to confirm whether they verbally consented to participate in the study. See Greiner & Pattanyak, *supra* note 30 at 21.

made to the claimant).⁴⁶ The researchers reasoned that offers of representation are “what a service provider actually does to attempt to improve a potential client’s situation,” and as such, it is worthwhile to measure the effects of same.⁴⁷ The measurement of an offer of representation also allows the researchers to focus on the service provider’s delivery system and operation. Finally, the researchers concluded that they could not randomize actual use of representation from an ethical standpoint.

Once subjects were divided into treated or control groups, the official records about the outcome achieved in the individual cases included in the study were scrutinized. It has been theorized that the claimants who had been offered representation (and ultimately accepted the offer of assistance) would achieve better results (i.e., greater monetary awards) than those individuals not offered assistance. Ultimately, the results from the randomized study suggested that an offer of assistance from the HLAB had “no statistically significant effect on the probability that a claimant would prevail.”⁴⁸ The researchers also concluded that the offer of representation delayed the adjudicatory process.

One of the noteworthy aspects of this research is the fact that Greiner and Pattanyak’s conclusions appear to run contrary to many of the earlier observational studies: these studies suggest that legal representation (as opposed to not having representation) typically has a positive impact on case outcomes. The discrepancy between the data collected in their randomized study and the data derived from the earlier studies caused Greiner and Pattanayak to re-examine the earlier studies. In so doing, they made some observations regarding the ‘rigour’ of the methodologies employed in the earlier studies. Based on their review, they concluded that the “only way to produce credible quantitative results on the effect of legal representation is with randomized trials.”⁴⁹

In addition to reviewing previous studies on the impact of representation on legal outcomes, the Harvard researchers engaged in an analysis of how the particular circumstances of their study might explain the lack of a statistically significant result. These explanations sought to contextualize the specific legal setting in which the research was conducted so as to provide insight in to possible explanations for the data results recorded. The explanations took account of the particular nature of the legal issue in dispute (unemployment benefits) as well as the type of procedure and process faced by the claimants in the study (specifically, face-tracked processes in which the adjudicators were used to hearing from self-represented parties).

⁴⁶ *Ibid* at 8-10.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at 6.

⁴⁹ *Ibid* at 56; a similar conclusion was reached by Jessica Steinberg following her non-randomized analysis of unbundled legal services offered to poor litigants involved in eviction cases in California. Jessica K Steinberg, “In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services” (2010-2011) 18 *Geo J on Poverty L & Pol’y* 453. Interestingly, a recent research project that Greiner and other researchers have undertaken includes the use of questionnaires to “obtain qualitative information about the study participants” in a study about different initiatives aimed at assisting consumers in financial crisis. In conducting long term surveys of consumers who had been in significant debt, the authors of the study state “[t]he surveys will assess elements of overall well-being that might conceivably be affected by counseling and representational interventions, such as self-reported stress levels, perceptions of the court system, and likelihood of compliance with any court-imposed remedies.” See Dalie Jimenez, D James Greiner, Lois R Lupica and Rebecca L Sandefur, “Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach” (2013) 20 (3) *Geo J on Poverty L & Pol’y* 449

VI. A DISCUSSION OF RANDOMIZED OUTCOME-BASED STUDIES

From a policy perspective, it is important to determine which individuals, issues and/or legal settings necessitate the assistance of counsel or whether some other equally appropriate form of legal service is relevant when distributing the limited resources that are available to individuals who would otherwise proceed without counsel.⁵⁰ Moreover, to the extent that assumptions are made about the perceived benefits of initiatives such as self-help or unbundled legal services and these assumptions form the basis of a justification for reduced funding for full representation, research data could be useful in challenging these assumptions. However, it is also equally important that the search for ‘scientific’ or ‘hard’ data that drives randomized outcome-based research and contributes to the justification of certain policy initiatives does not occupy the whole field. The utility of quantitative work need not diminish the corresponding need for qualitative research that incorporates a deeper contextualized understanding of the experiences of those engaged with the justice system; this understanding will extend beyond the specific outcome achieved. This contextualized understanding of individuals’ experiences is entirely consistent with a broader theory of access to justice that seeks to engage individuals in a conversation about justice, participation and their corresponding ability to affect justice. This approach is less an either/or issue and more about how both the quantitative and qualitative methods can complement each other.

Significantly, this dialogue about methodologies in access to justice research reflects a wider contestation about the practical and democratic theses of access to justice. The practical thesis focuses on ways in which to improve self-represented parties’ chances of obtaining a positive outcome in their legal matters. On the other hand, the democratic thesis incorporates a broader approach to access to justice that seeks to enhance citizens’ participation and engagement in the broader legal processes and political decisions that impact their lives. By engaging individuals, this broader approach to access to justice also seeks to expand the idea of what ‘justice’ may entail for different individuals in different contexts. For instance, Roderick MacDonald has suggested that, in this regard, access to justice “means most of all that people are able to find justice in their everyday encounters with public officials”.⁵¹ However, the ability to affect justice is impacted by individuals’ ability to engage with both rule-making and rule-administering institutions where principles of justice are established and implemented.⁵²

It is important to examine critically randomized outcome-based research in regard to this dialogue about methodologies. Specifically, this examination should take account of certain issues that are raised about outcome-based research as well as certain practical and ethical issues associated with conducting randomized research in a socio-legal setting. Generally speaking, these approaches raise several important questions - normative questions about the nature of access to justice and about what is being sought as the end-goal; whether this should be access to law as opposed to access to justice; and whether

⁵⁰ See the Boston Bar Association Task Force on Expanding the Civil Right to Counsel in Massachusetts in which it is acknowledged that different civil proceedings will require different levels of intervention by counsel and that, where appropriate, lesser forms of assistance may be provided. “Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts”, Boston Bar Association Task Force on Expanding the Civil Right to Trial, September 2008). Available online at: http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf.

⁵¹ MacDonald, “Access to Justice”, *supra* note 2 at 319.

⁵² *Ibid.*

‘justice’ may be characterized as something different from a successful outcome in a particular legal context. Related to these difficult normative inquiries is the primary question of how successful outcomes are or should be defined for the purposes of empirical research. However, even more fundamentally, it must be asked, given the challenges associated with measuring outcomes, whether a focus on outcomes should be the main driver of decisions about the overall direction of access to justice or whether it should be a piece of a larger puzzle. This ties in directly with the practical/democratic theses.

Outcome-based research is used because it can assist researchers in evaluating the efficacy of a particular legal service, assuming that outcomes are conceptualized in a particular way (which in itself raises difficult questions).⁵³ Moreover, the data resulting from this type of research will likely be used by policy-makers when they are called upon to make difficult decisions regarding resource allocation and the development of programs that seek to improve individuals’ access to justice. From a user’s perspective, there is also an argument that it is important that individuals seeking assistance are able to make use of the assistance in a meaningful way.

However, there are a couple of problems associated with such an emphasis on the measurement of legal outcomes. First, in some legal contexts, it may be important to distinguish between successful representation and successful outcomes. The former raises difficult questions about the quality of the services provided; this is something that the legal profession is often reluctant to consider.⁵⁴ For example, in the self-help setting, the legal services provided to the self-represented litigants are typically *pro bono*, made available to clients on a volunteer basis and, as a result, potentially lacking in terms of consistency between the individual’s interaction with different lawyers. As such, it would be difficult to account for differences in the quality of the legal service provided and the impact this might have on self-represented litigants’ ability to achieve a successful outcome. From a professional as well as research perspective, the underlying assumption is that to the extent that a self-represented litigant has failed to obtain a positive result, it is the fault of the self-represented litigant or the program design (among other factors), but is not related to the quality of the advice or information provided by the legal professional.

Second, defining what constitutes a ‘successful outcome’ may be less than straightforward. For example, providing legal advice that an individual not proceed with a particular claim (e.g. it has no basis in law) may result in a successful outcome if the individual follows the advice and decides not to pursue the legal issue. Moreover, from a legal standpoint, if the client was provided with good advice or information and was in a position to act on the advice provided in accordance with both procedural and substantive rules but still obtained a negative judgment, it may still not be an ‘unsuccessful outcome’.⁵⁵ With respect to judicial outcomes, there are invariably ‘winners’ and ‘losers’, which do not necessarily correlate with the nature of the assistance provided to the litigants.

⁵³ Abel, *supra* note 34; Greiner & Pattanyak, *supra* note 30.

⁵⁴ In their article entitled “Peer Review in Canada: Results from a Promising Experiment”, Fred Zemans and James Stribopoulos call for an increased research focus on the quality of legal services provided in the context of improving access to justice in order to ensure that those in need of access to representation receive quality representation. Fred Zemans & James Stribopoulos, “Peer Review in Canada: Results from a Promising Experiment” (2008) 46 Osgoode Hall LJ 697 at 698-699.

⁵⁵ Lucie White, “Specially Tailored Legal Services for Law-Income Persons in the Age of Wealth Inequality: Pragmatism or Capitulation” (1998-1999) 67 Fordham L Rev 2560, at 2561 [White, “Pragmatism or Capitulation”].

In defining the parameters of a successful outcome, researchers may canvass legal professionals who practice within the particular field. Again, this may be easier to do in certain legal contexts where there is a discernible solution to the legal matter. For example, in a study conducted on the impact of counsel in refugee determination hearings at the Canadian Immigration and Refugee Board, the researcher undertook to study the effect of counsel on outcomes achieved in refugee determination hearings.⁵⁶ In this particular context, it may be slightly easier to define a successful outcome, namely whether the Immigration and Refugee Board granted the individual refugee status. However, it is interesting to note that, even in this study, it was acknowledged that one of the challenges associated with conducting the research was the difficulty in accounting for the multiple variables (other than presence of counsel) that may impact the granting of refugee status.⁵⁷

The delineation of a successful outcome for the purpose of measuring the impact of a particular variable becomes even more problematic when there is more than one possible solution and/or it is less clear what constitutes the best solution in the particular circumstances. A good example of this is family law where competing interests and non-legal considerations may make it difficult to define a successful outcome for research purposes. Added to this uncertainty are some additional problems pertaining to research in poverty law where establishing what constitutes 'success' when dealing with members of a seriously disadvantaged population is further complicated. For instance, unlike other groups, disadvantaged groups tend not to suffer 'discrete' legal problems, which, once resolved, allow them to continue with their everyday life.⁵⁸ In these circumstances, the legal issue may be bound up with other socio-economic problems that require redress if the individual is to derive some meaningful benefit from the legal assistance.⁵⁹ As such, if the measurement of 'success' is to be meaningful and reflective of an actual improvement in the individual's life rather than a legal construct, the question becomes how are these other factors accounted for in the research?

In most studies, the definition of a successful outcome typically involves a consideration of the legal results achievable in a particular case. However, this analysis also fails to take account of the broader historical, political and social factors that may provide advantage to certain parties (ie., the 'haves') and result in disadvantage to other parties (ie., the 'have-nots') in terms of resources, the application of legal rules, as well as the structure of the various legal institutions.⁶⁰ The result of these varying advantages and disadvantages (many of which may not easily be accounted for in research design) is potentially different outcomes achieved within a particular type of case.

Moreover, in measuring the legal outcome achieved in a particular case, certain broader goals associated with political, social and economic concepts of justice may be overlooked.⁶¹ In fact, empirical studies have historically shied away from the study of 'justice' due to its contested normative

⁵⁶ Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Analysis" (2011) 49 Osgoode Hall LJ 71, at 82.

⁵⁷ *Ibid* at 84.

⁵⁸ Stephen Wexler, "Practicing Law for Poor People" (1970) 79 Yale LJ 1049.

⁵⁹ Ab Currie, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidences and Patterns" (April 2005) online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/docs/2006/currie.en.pdf>>.

⁶⁰ Marc Galanter, "Why the 'Haves' come out ahead: Speculations on the Limits of Legal Change" (1974-75) 9 Law & Soc'y Rev 95 at 97.

⁶¹ Nader, *supra* note 1 at 506-508; Eagly, *supra* note 32.

and political nature.⁶² For instance, in her review of a privately-funded community lawyer project in small town Connecticut, Laura Nader concluded that the benefits derived from legal assistance provided by a community lawyer to citizens wishing to raise issues affecting the entire community included a collective improvement in civic education among citizens and greater participation by those same citizens in the political and administrative decisions made by the local government.⁶³ Both of these ongoing and long-term political benefits would likely be overlooked in studies that focus exclusively on measuring the specific outcome achieved by an individual party with the assistance of the community lawyer.

The failure to take account of broader forms of social and political justice when evaluating outcomes is further complicated when examining access to justice initiatives that do not involve direct representation by counsel. In studying the impact of a community legal education program in Chicago, it was concluded that, unlike certain zero-sum litigation, it is more challenging to evaluate the results of an initiative such as a legal education program. This was particularly true in light of the fact that community legal education programs (like the one studied) tend to reach populations not otherwise served by traditional legal services, therefore the benefits may be diffused among the community. However, in gathering the stories of those individuals involved with the education initiative, the researcher, Eagly was able to ascertain the impact of the program on the individuals that participated and the corresponding benefits derived from the program.⁶⁴ Specifically, the program provided information about legal procedures and processes that potentially enabled individuals to participate in strategic decisions about their own case; the development of problem-solving skills; the enhancement of leadership skills; and consciousness-raising among community members about their rights and responsibilities through the dissemination of knowledge.⁶⁵ All of these benefits represent important access to justice objectives consistent with a democratic thesis.

However, empirical research that focuses on the specific legal outcomes achievable in a particular legal context may fail to take account of some of the broader political and social benefits to be gained by members of a community. With respect to these broader political and social benefits, it is also likely that outcome-based randomized studies would struggle to measure the long-term impact of providing certain legal services to a particular group over time. Even if such quantitative research was practically feasible, the prospect of conducting this type of longitudinal quantitative research would be extremely challenging. The effort to gather the sample populations large enough to perform certain analysis would be logistically challenging, if not impossible without the expenditure of significant financial and human resources. Both of these are not typically available to access to justice research.

From a practical perspective, measuring the impact of a particular legal service on the outcome in a legal case can be difficult given the number of variables (e.g., the disposition of a particular adjudicator, the approach of opposing counsel, and the abilities/resources of the self-represented litigant and the merit of the case) that potentially affect the outcome in even the most straightforward of circumstances. Interestingly, even within randomized research settings, it is not always possible to isolate the control

⁶² Austin Sarat et al, *Crossing Boundaries: Traditions and Transformations in Law & Society Research* (Evanston, IL: Northwestern Press, 1998).

⁶³ Nader, *supra* 1 at 505-509.

⁶⁴ Eagly, *supra* note 32, at 472.

⁶⁵ *Ibid* at 474, 479

and treated groups. Indeed, it is worth noting that, in Greiner and Pattanyak's study at Harvard, some members of the control group found legal assistance through other sources. Also, some members of the treated group declined to accept the offer of assistance from the clinic. The result was that even within randomized studies, it is not always possible to isolate the variable being studied or control the socio-legal setting in which the research is being conducted. Again, in conducting research on the efficacy of legal education programs, the ability to isolate the appropriate variable becomes even more difficult when examining legal services other than full representation such as 'unbundled' services. As a result of this difficulty, some of the research conducted on programs that offer limited legal assistance or unbundled legal services has failed to demonstrate discernible benefits to the client and/or has demonstrated mixed results.⁶⁶ These findings drive concerns about the appropriateness of using outcome measurement as a means of evaluating an access to justice initiative without randomizing the study.

One example of this phenomenon was a study by Jessica Steinberg. It was conducted in California on the unbundled legal services offered to individuals in housing eviction cases.⁶⁷ The study was designed to examine the impact of discrete legal services offered to poor litigants facing eviction in county court proceedings.⁶⁸ The study was observational and not randomized. A percentage of the litigants received assistance drafting court documents and a further percentage of those litigants also received assistance at pre-trial conferences. These cases were compared against a group of litigants who had full representation and against those without any assistance. In examining both the procedural and substantive outcomes achieved in each case, the research concluded that, while the self-represented litigants who received unbundled legal services were successful from a procedural justice standpoint, the impact on substantive outcomes was limited. It was noted that "recipients of unbundled aid fared no better than their unassisted counterparts on either possession or monetary outcomes....Nor did outcomes improve with increased unbundled legal aid."⁶⁹ In terms of the procedural justice benefits, the litigants who received unbundled services were better equipped to avoid default judgment and to raise valid and legally cognizable defences.⁷⁰ However, while there are potential benefits associated with providing individuals with unbundled assistance that allows them to defend against default judgment on a substantive basis, it was concluded that the provision of unbundled legal services in default proceedings did not ensure better overall substantive outcomes. This is true even if the litigant was successful in avoiding default judgment.⁷¹

⁶⁶ Steinberg, *supra* note 49; W Vaughan Stapleton & Lee E Teitelbaum, *In Defence of Youth: A Study of the Role of Counsel in American Juvenile Courts* (New York: Russell Sage, 1972); Carroll Seron et al, "The Impact of Legal Counsel on Outcomes for Poor Tenants in NYC's Housing Court: Results of a Randomized Experiment" (2001) 35 Law & Soc'y Rev 419.

⁶⁷ Steinberg, *supra* note 49; Ross Dolloff, "Let's Talk about Values, not Systems" (2003) Management Information Exchange Journal; Robert Bickel, "Limited Legal Services: Is it Worth it?" (2006) 39 Colum J L & Soc Probs 331; Empirical Research Group, UCLA School of Law, Evaluation of Van Nuys Legal Self-Help Centre, "Final Report" (August 30, 2001) online <http://www.courts.ca.gov/partners/...Final_Evaluation_Van_Nuys_SCH2001.doc>.

⁶⁸ Interestingly, the author of the study suggests that the study suffered from "methodological limitations as it was unable to measure the impact of unbundled legal services independent of the merit of the cases or the personal attributes of the clients who sought assistance." Steinberg, *supra* note 48 at 458.

⁶⁹ *Ibid* at 482.

⁷⁰ *Ibid* at 491.

⁷¹ *Ibid* at 494.

In light of these findings and notwithstanding the fact that there was no generalizable correlation between the provision of unbundled legal services and better substantive outcomes, Steinberg highlighted certain benefits associated with the provision of unbundled legal services. Notwithstanding the actual outcomes achieved, the data suggested that the self-represented litigants who received unbundled services were better informed about their rights and potentially better able to address matters in the future.⁷² This may be particularly relevant in light of the legal context, namely low-income individuals dealing with housing evictions. Specifically, the dissemination of pertinent legal information represents an important practical result that should not be overlooked when developing and implementing access to justice initiatives. The self-represented litigants gained knowledge about their legal rights and responsibilities and were, in theory, in a position to use that information in the future as well as potentially distribute the information gained to other individuals within their community.

While proponents of randomized studies maintain that randomization is better suited to the task of drawing causal connections between the outcome and the type of representation being studied, there is still debate as to how this can best be achieved. Moreover, even within randomized studies, it is very difficult to isolate the variable being studied, namely the legal service, from some of the other aspects of the legal matter that may influence the resolution of the matter. As is the case with other social science research that involves fieldwork, it is not possible to replicate a purely experimental setting in which the researcher can isolate and causally measure the impact of a particular variable.⁷³ Again, this is particularly complicated when examining non-traditional legal services used by low-income clients and/or disadvantaged or vulnerable clients. The unpredictability and often demanding nature of addressing the needs of disadvantaged groups raises unique challenges when attempting to isolate the cause and effect of a legal service on the outcome achieved.

In addition to various practical challenges associated with outcome-based research, there are important ethical challenges respecting the withholding of legal services to otherwise deserving clients. In the Harvard study, Greiner and Pattanayak distinguished the treated and control group by offering legal representation to the treated group and not offering assistance to the control group. Thus, the variable that was controlled for was the offer of assistance rather than withholding of actual legal services. This was defended, in part, on the basis that the clinic was not in a position to offer assistance to all those seeking it.⁷⁴ As such, offers of assistance only to certain clients (but not all clients) would happen in any event. While this is likely true, it raises difficult questions about whether there is a difference between allowing the legal clinic's capacity to dictate who will receive its services (and/or adhering to an established policy regarding how this issue will be addressed when there are limited

⁷² *Ibid.*

⁷³ For e.g. in her review of access to justice research and methodologies, Liz Curran insists that randomized studies are problematic when attempting to evaluate legal services due to the "complex and diverse nature of the legal assistance service, the clients they serve and the setting they are in?" Curran, *supra* note 39 at 15.

⁷⁴ Greiner & Pattanyak, *supra* note 30, at 5, 8 & 10. In the poverty law context, Paul R Tremblay makes note of the 'scarcity' of legal services that inevitably leads to poverty lawyers being faced with the reality that there are more poor clients than resources, time or money to serve these clients. See Paul R Tremblay, "Acting 'A Very Moral Type of God': Triage among Poor Clients" (1999) 67 Fordham L Rev 2475.

resources available⁷⁵) and randomly assigning assistance to anonymous clients in order to ‘test’ the impact of assistance on the outcome achieved by the client.⁷⁶

This rationalization about randomizing offers of assistance can be contrasted with the discussion about the ethical challenges associated with triage in legal clinics. While it is acknowledged that front line lawyers in legal clinics will need to make difficult decisions about who they can and cannot assist, the factors that impact these decisions must be carefully considered and be consistent with the overall goals and objectives of the clinic, the needs of the individuals seeking assistance and the broader socio-political setting in which the legal clinic is situated.⁷⁷ Randomized research raises additional ethical challenges in the specific context of poverty law because the research (where the supply of services is controlled by a researcher) is conducted in a setting in which individuals are particularly vulnerable and most in need of assistance.⁷⁸ Coupled with this is the concern that the research is driven by a focus on the expenditure of limited resources rather than a determination of what certain groups need and what will directly improve their ability to affect justice.⁷⁹ Moreover, recent statistics suggest that there is a growing lack of access to justice and legal processes among middle-income individuals.⁸⁰ In certain respects, the legal challenges faced by middle-income individuals will be different than low-income individuals and/or disadvantaged groups. As such, there are questions about the ability to import the research data gained from a poverty context in to other contexts.

These reservations about outcomes and randomized research as a means of measuring outcomes suggest the need for a more important agenda of issues about the appropriate focus of access to justice research. In particular, it raises a larger and more compelling question of how a particular methodological approach supports a theory of access to justice going forward. Specifically, it can be asked whether the provision of legal services should be the end goal of access to justice or whether there are broader principles and goals that should frame access to justice research and policy? I now turn to addressing some of these matters and seek to offer some tentative answers.

⁷⁵ *Ibid.*

⁷⁶ Although practically speaking many clinics are quite resourceful at finding ways to assist individuals, even when beyond capacity. Interestingly in the medical context, when testing the impact of a new drug, it is not acceptable to withhold existing treatments that address the medical condition in question in order to isolate and measure the impact of the new drug. Moreover, even within the medical field where randomized controlled studies are prevalent, there are continuing ethical debates. These debates are rooted in the disparity between a physician’s obligation to the patient they are examining – namely that there not be any arbitrariness in the care they provide and the clinical research setting where randomization does include arbitrary delivery of treatment. While the medical situation is not identical to the legal context (particularly the civil law context), randomization raises important ethical questions respecting the ‘withholding’ of services to those in need that are not easily addressed. See David Wendler “The Ethics of Clinical Research” in *The Stanford Encyclopedia of Philosophy*, Fall 2012 ed by Edward N Zalta, online: [Stanford Encyclopedia of Philosophy](http://plato.stanford.edu/archives/fall 2012/entries/clinical-research/) <<http://plato.stanford.edu/archives/fall 2012/entries/clinical-research/>>.

⁷⁷ Tremblay, *supra* note 74, at 2477.

⁷⁸ Again, in the medical context, randomized clinical research raises ethical concerns about exploitation – specifically whether the research exposes subjects to risks in order to collect data for potential benefit of future subjects. See Wendler *supra* note 76. In a poverty law context, the question that arises is whether researchers are further exploiting a group of individuals that are already marginalized.

⁷⁹ Albiston & Sandefur, *supra* note 28 at 104.

⁸⁰ Jamie Baxter, Michael Trebilcock & Albert Yoon, “The Ontario Civil Legal Needs Project: A Comparative Analysis of 2009 Survey Data” in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds, *Middle-Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 55.

VII. THE IMPORTANCE OF QUALITATIVE RESEARCH

The present focus on outcome-based research draws upon an access to justice theory that is concerned with improving access to justice by providing individuals with various kinds of legal services in order to address their legal issues. While outcome-based studies maintain that the obtainment of ‘hard data’ will allow policy-makers and professionals to improve access by providing better and more efficient programs, there is a deeper question about whether this should be the ultimate or dominant goal. I contend that the research that supports a traditional route to access through expanded legal services and simplified court processes does not go far enough in terms of a theoretical framework.⁸¹ As Rebecca Sandefur concluded the “typical ways of conceptualizing people’s experiences with civil justice problems focus too narrowly on law...[;] Stepping back to look at the whole canvas of public experience with civil justice problems reveals that we need not merely provide additional access to law, but also more creativity in thinking about access to justice.”⁸² Thus, within a comprehensive theory of access to justice, it will be important to focus not just on improving access, but on enhancing the ways by which individuals can give meaning to the concept of justice in their lives and in the life of their communities. In order to do so, it is important that individuals are provided with meaningful access to a variety of forums in which they can participate. This should include access to traditional legal institutions as well as non-legal institutions and processes. However, in developing a comprehensive approach to access, it is essential that researchers engage with those individuals who attempt to seek access to the various legal processes and institutions regarding their experiences and perspectives. The goal in this regard is to ensure that the approaches to access that are adopted reflect the needs and expectations of those that are being encouraged to participate. Research that seeks to understand citizens’ experiences, perspectives and perceptions is also consistent with the democratic principle that individuals should have a say in the development and administration of the institutions that affect them. Moreover, this approach to research is consistent with the democratic thesis and the corresponding commitment to participatory democracy, which expects that individuals will contribute to the decisions, that impact them and the greater community in which they live.

Only a small percentage of individuals’ civil legal needs are articulated as legal problems and addressed in formal legal settings. Furthermore, the practical reality is that neither the state nor the legal profession are in a position to provide and/or fund the level of legal representation needed to address every individual’s legal issues. This is true from both a financial as well as a bureaucratic perspective. Moreover, there is a segment of the population who do not want to relinquish their legal problem to a legal professional. For example, research that included interviews with appellants who chose to represent themselves at the appellate level concluded that self-representation allows them to have more control over the legal process in which they are participating notwithstanding the potential for a negative outcome.⁸³ In representing themselves, the appellants felt they could ensure that the issues are presented in the order and style that they chose.⁸⁴ All of these practical considerations need to be attended to when theorizing about access to justice and when doing the actual research.

⁸¹ Sandefur, *supra* note 31 at 52.

⁸² *Ibid* at 52.

⁸³ Scott Barclay, “Decision to Self-Represent” (1996) 77 Social Science Quarterly 912.

⁸⁴ *Ibid*.

These practical realities pose a further challenge to the development of a comprehensive access to justice theory - namely, whether access to justice may be better served by moving away from a focus on the provision of an 'equal' and 'elite' level of legal services for all citizens.⁸⁵ Historically, this focus on 'equal and elite' legal services has had a twofold effect: (1) it has prioritized programs that are directed at providing legal services to those who cannot otherwise afford the services; and (2) it has driven the outcome-based research that is aimed at determining the effectiveness of these services.⁸⁶ As regards to the latter, it is important that the "pull of the policy audience" is resisted such that the research questions and projects do not only fit policy-makers' definition of a problem and the goals sought to address the problem.⁸⁷ Instead, access to justice theory should "in the context of the present levels of wealth inequality....endorse the idea that the social needs of disenfranchised groups should be addressed *sui generis*, in ways that reflect their own experiences of need, their embedded historical and cultural realities, the societal power landscapes from their perspectives, their capacities, and their normative aspirations."⁸⁸ This shift in objectives associated with access to justice theory requires a corresponding shift in access to justice research objectives so that the research data collected reflects the experiences and perspectives of the disenfranchised groups presently attempting and/or unable to access to justice and further identifies the actual needs and expectations of these individuals.⁸⁹

A useful analogy is to a similar debate in the field of health care delivery. It is asserted that a 'universal standard of health services' is a bad idea from both a short-term and long-term perspective.⁹⁰ From a short-term perspective, a 'universal standard of care' does not allow for a contextualized approach that takes account of different groups different needs at different times. From a long-term perspective, the focus on standardized services that are framed around elite practices and institutions actually perpetuate the separation of institutional practices that maintain social stratification rather than move society toward a goal of institutional equality.⁹¹ In the context of legal service delivery, prioritizing the value of an adversarial legal system that contemplates an ideal of equality of legal services becomes problematic when the result is a failure to deliver an elite and uniform quality and level of services to some but not all citizens.⁹²

In the legal context, the more traditional route travelled in providing access to services can be contrasted with a broader concept of access to justice that moves away from a focus on the provision of standard services. For instance, Roderick MacDonald has stated: "[i]n a liberal democracy, true access to justice requires that all people should have an equal right to participate in every institution where law

⁸⁵ White, "Pragmatism or Capitulation" *supra* note 55 at 2578.

⁸⁶ *Ibid.*

⁸⁷ Albiston & Sandefur, *supra* note 28, at 104.

⁸⁸ White, "Pragmatism or Capitulation" *supra* note 55 at 2578.

⁸⁹ See recent research conducted on self-help programs in Australia by Merran Lawler, Jeff Gidding and Michael Robertson in which the researchers, through interviews, observation and case studies sought to gain insight into the "particular experiences and perspectives of self-help themselves instead of focusing on explorations of the potential impact of legal self-help on the smooth administration of justice." See Merran Lawler, Jeff Gidding & Michael Robertson, "Opportunities and Limitations in the Provision of Self-Help Legal Resources to Citizens in Need" (2012) 30 Windsor YB Access Just 185 at 187.

⁹⁰ White, "Pragmatism or Capitulation", *supra* note 55 at 2578-2579.

⁹¹ *Ibid.*

⁹² *Ibid* at 2579

is debated, created, found, organized, administered, interpreted and applied. ...Improving access to legal education, to the judiciary, to the public service and the police, to Parliament and to various law societies is now seen as the best way of changing the system to overcome the disempowerment, disrespect and disengagement felt by many citizens.”⁹³ This conceptualization is consistent with the democratic thesis because it seeks to promote direct citizen participation in law-making and law-administering institutions and processes. By encouraging citizens to participate directly in the creation and development of laws to which they are subject, a more just and democratic society might arise.⁹⁴ In this regard, the goal in encouraging participation is not to assume individuals will take “control of the political process in large and complex modern society nor is the goal to affect radical court reform. Rather, the goals are more modest, but more immediate and relevant to individual citizens’ lives – namely to foster direct and meaningful participation when and where individuals so choose. This will enable them to become engaged in the political and legal decisions that impact their lives and to be included in the debates that form the basis of democratic decision-making. This approach seeks to encourage engagement on local as well as national levels and in a variety of forums.

One of the more potentially specific effects of individual’s direct engagement with the legal institutions that govern their life is the potential for the ‘democratization of law’. This entails a move away from the professionalization of law that has necessitated the need for full representation and a tentative move toward self-representation and direct engagement.⁹⁵ By contributing through legal processes directly, there is also an opportunity for individuals to develop and incorporate their own distinctive concepts of justice. In developing same, individuals will contribute to and be more likely to accept a legal system that is legitimate and transparent; these objectives are both consistent with democratic values and principles. By contrast, the failure to facilitate participation (as a consequence of a lack of access) results in disengagement by citizens from conversations about justice and from the legal system more specifically.⁹⁶ Further consequences associated with this disengagement include the loss of the citizenry’s voluntary adherence to the legal system and a corresponding lack of legitimacy in the legal system.

In order to protect against these negative consequences, it is necessary to engage citizens in the creation of a ‘new legal vernacular.’⁹⁷ The creation of a ‘new legal vernacular’ assists in developing a community’s legal knowledge thereby fostering citizens’ further ability to understand, engage in and ultimately shape legal institutions and processes. This, in turn provides more opportunities for individuals to affect justice in their lives and in the collective lives of their communities. Consistent with this democratic approach, access to justice contemplates a kind of participation and citizen engagement that has the potential to enhance social, economic and political forms of justice. In this regard, participation is linked to the advancement of a justice system that is both reflective of and constituted by the individuals engaged with it.

⁹³ Roderick MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Bass, Bogart & Zemans *supra* note 3 at 23.

⁹⁴ Gross Stein & Cook, *supra* note 3 at 170-171.

⁹⁵ Zimmerman & Tyler, *supra* note 6 at 503-504.

⁹⁶ Gross Stein & Cook, *supra* note 3 at 170-171.

⁹⁷ *Ibid.*

This democratic approach to access to justice requires a move away from an exclusive focus on improving access to legal services or legal representation. These have been criticized as “tokens of power achievement”.⁹⁸ Instead, there should be a move toward “redefining the traditional roles played by both the citizens and the legal profession”⁹⁹ so that individuals are able to access various democratic institutions and processes, not just where law is administered but also where law is constituted. From a research perspective, this approach also takes account of the social and political nature of law such that access to justice initiatives are evaluated in terms of how the initiative provides individuals with opportunities to engage meaningfully with the democratic process on their terms.

Most importantly, this democratic approach necessarily involves research that includes the perspectives and views of the individuals seeking access in order to ensure that the initiatives developed to promote meaningful participation are reflective of individuals’ actual needs and expectations. To the extent that access to justice theory is informed by principles of participatory democracy and engagement, the research undertaken in conjunction with this theoretical approach should also make sure that the individuals ultimately impacted by this approach are provided an opportunity to provide their input. In other words, if the underlying theoretical approach to access is driven by democratic principles and goals, then it is important that the research undertaken in furtherance of that theoretical approach should also reflect democratic principles. In this context, that requires engagement with and participation by the citizens attempting to access justice. Therefore, before it is possible to choose between potential solutions aimed at enhancing access, it is vital that the “people bearing the greatest weight of the current failure of our institutions...(the public)...be consulted about what they want when they face civil justice problems.”¹⁰⁰ While this sentiment was originally expressed in the context of outcome-based research, it is also relevant in terms of research that is influenced by a broader and more democratic concept of access to justice.

In accordance with this broader conceptualization of access to justice that seeks to encourage citizens’ direct engagement, it is imperative that those same citizens be asked about their needs as well as their experiences and perceptions when attempting to engage in public institutions.¹⁰¹ Underlying this approach is the claim that individuals act on their perceptions and those actions have real-world consequences. As such, the subjective reality experienced by an individual is no less real than the putative objectively defined and measured reality offered by quantitative scholars.¹⁰² In this regard, qualitative ethnographic-based research on access to justice becomes an important tool by which to examine individuals’ experiences and how those experiences are likely to impact the individual’s continuing participation in accordance with an objective that seeks wide and frequent participation. Drawing on data and methodologies used in the fields of procedural justice and legal consciousness, qualitative research on access to justice can continue to examine how individuals’ experiences with certain legal institutions and processes shape their ability and/or willingness to participate further in law

⁹⁸ Tremblay, *supra* note 74, at 2477.

⁹⁹ Gross Stein & Cook, *supra* note 3 at 170.

¹⁰⁰ Sandefur, *supra* note 30 at 85; See also Lawler, Gidding & Robertson, *supra* note 89 in which it was noted that the lack of data on the particular experiences and perspectives of self-helpers in Australia necessitated the need for qualitative research that sought to understand the role of self-help from the users’ perspective. It was further noted that much of the earlier research had focused on how self-help as an initiative impacted the larger system of justice.

¹⁰¹ Merry, *supra* note 12, at 9; Eagly, *supra* note 32.

¹⁰² David M Fetterman, *Ethnography*, 2nd ed (Thousand Oaks, CA: Sage, 1998) at 5.

as well as other political processes.¹⁰³ This can, in turn, shape the development and implementation of the policy and initiatives that promote meaningful participation.

A qualitative approach to access to justice research can highlight “how people’s sense of fairness is formed through their particular experiences within the legal system and in relation to the litigants’ embeddedness in the institutional context.”¹⁰⁴ This approach takes account of certain structural constraints (i.e., the role of professionals, opportunities that law provides, and the social and financial resources available). It also incorporates the fact that individuals manoeuvre through legal structures based on their legal consciousness, but individuals’ legal consciousness may, in turn, be shaped by the legal structures and processes that they encounter.¹⁰⁵ As such, a self-represented litigant’s understandings of law and expectations of fairness may be constituted and sometimes re-constituted by their experiences within certain institutional settings; this further influences the meaning that they give law. Because qualitative research seeks to understand the actual experiences of individuals attempting to access justice, it can help to reconcile this constitutive process. In this regard, examining individuals’ actual lived experiences with participation can provide a concrete context in which to contrast and compare these ‘lived experiences’ with the goals underlying participatory democracy. In so doing, attempts can then be made to reconcile better theory and practice.

Research in the field of procedural fairness has concentrated on the subjective experiences of litigants as a means of understanding how individuals evaluate the fairness of a legal process and legal institution. This theoretical approach is set against the randomized outcome-based research which focuses on evaluating the objective outcomes achieved. By contrast, the procedural fairness research shows that individuals in adversarial settings distinguish process from outcome when evaluating the ‘fairness’ of the procedure and are more likely to accept an unfavourable outcome if they believe that the process used to arrive at the outcome was fundamentally fair.¹⁰⁶ In this regard, issues of process play a central role in how litigants react to their experiences in court.¹⁰⁷ This does not mean that the outcome is irrelevant, but only that there are other elements of the adjudicatory process that significantly affect an individual’s perception of fairness and willingness to accept the legitimacy of that process.

¹⁰³ Sally Merry’s research respecting self-represented litigants’ court experiences in Boston provides a good example of this type of qualitative research in access to justice. Her research examined patterns of court use by working class individuals who ‘went to court’ (and/or mediation) to resolve their problems. Part of the scope of the research examined the individuals’ legal consciousness, which Merry defined as “the way people understand and use law”. Merry maintained that consciousness is formed and develops and re-formed through individual experience including their experiences within certain social/legal structures. Merry observed that individuals’ legal consciousness changed as they went through court processes and that as a result there were contradictions between what they expected beforehand and what happened to them in court. Merry, *supra* note 12, at 5.

¹⁰⁴ Berrey, Hoffman & Nielsen, *supra* note 15 at 6.

¹⁰⁵ *Ibid* at 6.

¹⁰⁶ Hazel Genn, “Tribunals and Informal Justice” (1993) 56 Mod L Rev 393 at 14; EA Lind & T Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988) EA Lind, R Lissak & D Conlon, “Decision Control and Process Control: Effects on Procedural Fairness Judgments” (1983) 13:4 Journal of Applied Social Psychology 338; R Lissak & B Sheppard, “Beyond Fairness: The Criterion Problem in Research on Dispute Intervention” (1983) 13:2 Journal of Applied Social Psychology 45.

¹⁰⁷ Zimmerman & Tyler, *supra* note 6 at 483-485.

Thibault and Walker were among the first researchers to conduct research in the field of procedural justice in 1975.¹⁰⁸ They hypothesized that “litigants’ satisfaction with dispute resolution decisions would be independently influenced by their judgment about the fairness of the dispute resolution process.”¹⁰⁹ They sought to examine individuals’ perceptions about the justness of court procedures by recording individuals’ reaction to different legal processes. Based on the results obtained, Thibault and Walker ultimately concluded that “the just procedure for resolving the types of conflict that result in litigation is a procedure that entrusts much control over the process to the disputants themselves and relatively little control to the decision-maker.”¹¹⁰ This conclusion is particularly relevant to self-represented litigants in light of the fact that their participation is not mediated by legal representation. One of the specific questions that arise in this regard, is how the provision of services (such as those offered to self-represented litigants at self-help centres) impacts the self-represented litigants’ ability to engage with those adjudicatory processes and what the ramifications of that engagement are for the individual’s evaluation of their experience.

In recent years, studies about procedural fairness have been extended to encompass the relative importance of the different fairness criteria used by an individual when assessing the ‘justness’ of an experience as well as the interrelationship between the different criteria in various legal settings. One of the conclusions drawn from this recent research involves the importance that litigants place on their opportunity to be represented in the litigation process.¹¹¹ ‘Having a voice’ in the process is considered “central to people’s subjective reactions to that experience”¹¹² because it allows them to tell ‘their side of the story.’ It also reassures the litigants that the decision-makers are listening to and considering their stories when making decisions.¹¹³ Flowing from this is the question of whether litigants, in valuing direct interaction with the decision-maker, will demand more direct participation in their own legal process. This question has important ramifications when examining the unique context of self-represented litigants within access to justice more generally.

Overall, therefore, the research conducted in the field of procedural justice has attempted to identify those aspects of adjudicatory processes that affect individual litigants’ experience in and perceptions about their experience. Adopting a broad conceptualization of procedural justice that extends beyond a consideration of the technical rules and procedures can assist in evaluating the litigant’s overall experience in accordance with principles of natural justice. A wider conceptualization of procedural fairness in accordance with principles of natural justice allows account to be taken of certain criteria such as whether individuals are able to tell their side of the story and whether the decision is based on the facts presented. Moreover, it has been taken for granted that, historically, the perspectives of the legal profession have informed the discussion and framed the issues respecting access. However, there

¹⁰⁸ J Thibault & L Walker, *Procedural Justice: A Psychological Analysis* (New York: John Wiley & Sons, 1975). The authors note that prior to the 1970s there was a limited amount of procedural justice research, which tended to focus on particular aspects of the legal process. As a result, the consensus was that there was little social science research on the topic of procedure.

¹⁰⁹ Tom R Tyler, “What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures” (1988) 22:1 Law & Soc’y 103 at 103.

¹¹⁰ Thibault & Walker, *supra* note 103 at 2.

¹¹¹ The use of the term “to be represented” is not in this particular context, restricted to representation by legal counsel.

¹¹² Zimmerman & Tyler *supra* note 6 at 503-504.

¹¹³ *Ibid* at 503.

are questions about whether these views coincide with the self-represented litigants' actual experiences in the civil justice system. For example, recent research conducted in Australia about individuals' experiences with self-help legal services indicated that there may be significant differences between the motivation of those developing the self-help resources and the motivations of the individuals using self-help.¹¹⁴ In undertaking research that sought to understand the self-help user's experience from their own perspective, the researchers sought to address a concern that legal service providers develop self-help resources from an "entirely law-centric perspective" that maintains their position as gatekeepers of the legal system who only allow those with certain legal knowledge and information to gain entry.¹¹⁵ Given these potentially differing perspectives, qualitative research can draw upon some of the procedural justice criteria to explore how self-represented litigants evaluate their own experience; how the self-represented litigants' perspective might differ from the existing perspectives and what this means for access to justice policy and initiatives going forward.

All of these approaches can inform a qualitative methodology in access to justice research. A blend of different research approaches is best suited to a qualitative analysis that seeks to include both contextual and diverse perspectives. These approaches focus on in-depth analysis of a limited number of cases rather than a causal explanation of the link between certain variables. These approaches "reveal particularity and diversity and are good at enabling greater sense to be made of a situation that might not be evident with a more superficial study."¹¹⁶ In this regard, qualitative data has the opportunity to provide rich detailed results about what self-represented litigants actually think about how they engage in the civil justice system with limited assistance.

Considering the above, it is prudent to recommend that qualitative research on access to justice would be assisted by combining different aspects of the methodologies surveyed. For example, qualitative research methods might likely include in-depth interviews with self-represented litigants who have received different forms of assistance and proceeded to represent themselves. Sally Merry's research regarding legal consciousness provides a further example of this type of research. In speaking to subjects, listening to them talk in mediation and in different court settings and observing how they handled their particular legal matter, she was able to gain a varied and fuller perspective from her subjects. In so doing, she was able to draw certain inferences about the individuals' legal consciousness.¹¹⁷ The triangulation of research methods such as in-depth interviews and observational techniques allows for a richer and more detailed account of the individuals' experience. These accounts have particular relevance to the democratic thesis.

In conducting this type of qualitative research, it is important to take account of some of the criticisms that have been leveled against earlier outcome-based studies as well as consciousness-focused studies. For instance, it has been contended that a "rigorous effort" contributes to the knowledge base in a particular field while a poorly-designed or executed study only adds "noise to the system".¹¹⁸ One of the most significant criticisms leveled at the qualitative, observational access to justice research is that it purports to draw causal connections that are not justified by the qualitative methods employed. Based

¹¹⁴ Lawler, Gidding & Robertson, *supra* note 89.

¹¹⁵ *Ibid* at 186.

¹¹⁶ Curran, *supra* note 39 at 15.

¹¹⁷ Merry, *supra* note 13, at 9.

¹¹⁸ Fetterman, *supra* note 102 at 145.

on this criticism, therefore, it is important that the objectives of qualitative research are clearly and modestly outlined; they must be consistent with the type of data that will be collected. Furthermore, in conducting qualitative studies, it will be important to acknowledge that the data gathered from such studies may be representative only “in the sense of capturing a range or variation in a phenomenon,” and not in the sense of “allowing for the estimation of the distribution of the phenomenon in the population as a whole.”¹¹⁹ Specifically, the collection of qualitative data should contribute to a conversation about what access to justice means to those directly impacted by and engaged with the justice system. In turn, it can be shown how those individuals’ ability to affect justice in their lives and their communities is shaped. In this context, in-depth knowledge about an individual’s particular experience can provide more assistance than fleeting and impersonal knowledge from a larger sample.¹²⁰

VIII. CONCLUSION

In conclusion, if access to justice research and policy-making is to make important headway, it will require further and better attention to its underlying conceptual and methodological foundations. While being critical of the quantitative turn in recent empirical research, I do not mean to suggest that such work has no role to play. On the contrary, I maintain that a more catholic and less narrow approach to empirical work is demanded if access to justice research is to fulfill its potential. This is one that will value both quantitative and qualitative research. Quantitative research has much to offer and recommend, but it must be part of a more encompassing research agenda that takes account of an equally encompassing theoretical framework. Such a program will examine not only the impact of various legal and policy initiatives on outcomes achieved in individual cases, but also the effect of such interventions on people’s capacity to participate more fully in the legal and political process. It is only by aligning and reconciling the continued importance of qualitative research within a broader conceptualization of access that it will be possible to advance the practical efficacy of the legal process as well as its democratic legitimacy.

¹¹⁹ Lisa Webley, “Qualitative Approaches to Empirical Legal Studies” in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Studies* (Oxford, UK: Oxford University Press, 2010) at 943.

¹²⁰ John Gerring, *Case Study Research: Principles and Practices* (Cambridge, New York: Cambridge University Press, 2007) at 4-5.