Access to Justice and Beyond

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[*draft Sept 24, 2009*]

Introduction

Much ink has been spilled on the crisis of access to justice in Canada.[1] Much less ink has been devoted to how this crisis may be solved. Remarkably few scholars, and even fewer policy-makers, have advocated for innovation in the justice system for as long or as loud as Michael Trebilcock. This essay explores Trebilcock's wide-ranging scholarship on access to the justice system, from his studies of consumer protection in the 1970's and his work on public choice in the 1980s to his leadership in rethinking legal aid in 1997 and, most recently, his 2008 Legal Aid Review. [2]

Trebilcock's scholarship on the justice system spanning four decades may be characterized by a number of interlocking themes: the consumer welfare perspective, the search for evidence-based policies, the need to deploy a wide range of regulatory instruments to improve the effectiveness and efficiency of legal service delivery, and the courage to pursue good ideas wherever they took him. Michael's good ideas led him to propose increased access to the courts but also increased access to regulation, the market, and self-help measures employed by individuals and groups.

Unlike most access to justice scholars, Trebilcock employed economic analysis including public choice analysis, to help identify both the problems and the possible remedies. This alone would make him an innovative and influential scholar in this field. But there is more. Michael Trebilcock has contributed by always pushing the boundaries of the access to justice field. He has done this by situating the problem of access to justice in a broad context that includes all the branches of the public sector, the market, and many other aspects of civil society.

While few would suggest they oppose "innovation" in the abstract, the barriers to innovation in the design and delivery of legal services are many (though too rarely examined in a Canadian context).[3] The unmet need for those services, however, continues

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[1] See Hon. Chief Justice Beverly McLachlin, "The Challenges We Face" (Remarks to the Empire Club of Canada, March 8 2007); T. Tyler, "Legal aid rules shut out thousands; Many earning under $16,000 face uphill battle trying to represent themselves in complex cases", Toronto Star, March 3, 2007; and W. Winkler, *"Ensuring 'access to justice'"*, Toronto Star, May 18, 2008. See also D. Christie, "Access to Law" (2007) 40 U.B.C. L. Rev. 487-533.

[2] Michael Trebilcock, *Legal Aid Review* (Ministry of the Attorney General, 2008) http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock

[3] See Gillian Hadfield "Barriers to Legal Innovation" (2008) Stanford L.R. 101.

to grow, and extend the ripple effect of individual harms, economic inefficiencies and social dysfunction.

In this paper, we examine Trebilcock's approach to questions of access as a realm of innovation designed to ensure an efficient and effective justice system. We argue there is significant room for, and need for a new blend of regulatory and delivery models for matching legal services with public need, but that the dearth of empirical data in Canada makes innovation more difficult.

Our analysis will be divided into three sections. The first section will examine Trebilcock's engagement with access to justice issues in the context of consumer protection. The second section will focus on innovation in the delivery of legal services. Finally, the third section will explore some of the lessons that Trebilcock's scholarship provides for future scholars of access to justice.

Part One: Consumer Protection

Many of Trebilcock's articles in the early 1970's focused on consumer protection. Although some of these articles seem dated today[4], they contain many of the themes that run throughout his later work including the use of economic analysis and wide ranging innovation and experimentation in policy design. The articles also demonstrate the combination of hard-headed reason and soft-hearted passion and compassion that characterizes Michael Trebilcock as a person. During the 1970's, Michael volunteered much time for consumer groups.[5] Much of the consumer protection work was premised on the notion that without fundamental reform of the legal and political system, "the observation of the late Senator Robert Kennedy that large sections of the community now see the law as an essentially hostile institution- it seems only ever to take things away from them-remains uncomfortably close to the truth."[6]

In one early article published in 1970, Trebilcock faced the problem of the difficulties of ensuring access to justice for consumers. He expressed considerable skepticism about various forms of "paternalism"[7] then in vogue that would arbitrarily limit a consumer's choice of goods. He expressed skepticism about reforms such as interest rate ceilings. [8]At the same time, he also expressed skepticism about the free market perfection route of attempting to ensure that consumers simply receive full information. In his typical

[4] But see Anthony Duggan "Consumer Credit Redux" in this volume suggesting that scholarship about truth in lending is making a comeback in the wake of the recent economic collapse.
[5] For Michael's influential in Australia on these issues before coming to Canada see Anthony Duggan "Consumer Credit Redux"
[6]M .J, Trebilcock "Protecting Consumers Against Purchases of Defective Merchandise" (1971) 4 Adelaide L.Rev.12 at 42.
[7] M,J, Trebilcock "Consumer Protection in an Affluent Society" (1970) 16 McGill L.J. 263 at 274. The issue of paternalism is examined more fully over two decades later in Michael Trebilcock *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993) ch.7.
[8] D.J. Cayne and M.J. Trebilcock "Market Considerations in the Formulation of Consumer Protection Policy" (1973) 23 U.T.L.J. 396 at 415. See Iain Ramsay "'To Heap Distress upon Distress?'Comparative Reflections on Interest Rate Ceilings" in this volume.

mixture of hard-headed realism employed for progressive ends, Trebilcock insisted on a "realistic assessment" of the respective bargaining position of large corporations and consumers and recognized the impossibility of litigating all possible consumer rights whether they are "bargained for or conferred by statute".[9] He then cited studies demonstrating that paucity of consumer claims in the ordinary courts. He warned against the instinctive tendency at the time to interpret the results of these studies as a form of discrimination against the poor. The answer for him was more complex and based on a shrewd recognition that "it pays *nobody* in our present system…to litigate the usual kind of consumer claim."[10] This analysis was insightful both in its implicit recognition of the need for small claims courts, but also in its recognition of the inherent limits of even accessible adjudication in enforcing standards for consumer products.

In 1971, Trebilcock warned that the notion "that any claim, no matter how small, warrants Ritz Hotel style justice" [11] must go. He was creative in his approach to the many means to achieve better consumer protection. These means included small claims courts and class actions, but they also included increased use of mediation and arbitration at a time when alternative dispute resolution was not in vogue. Another means was increasing consumers' right to information so that they could make informed choices. Trebilcock also realized, however, that such remedies would be limited by the poor's lack of education and time.. He also explored greater use of regulation including the tougher sanctions provided by criminal or quasi-criminal legislation . A heading in a 1971 article about protecting consumers for defective merchandise succinctly captured Trebilcock's pragmatic approach: "exploiting all options".[12]

Although Trebilcock has been a constant advocate for policy innovation, he has also been a modest and cautious one. In 1973, he wrote an article warning about the dangers of ignoring consumer preferences and making matters worse for the poor by simplistic interventions into the markets that operated in their communities or "ghettos" as they were called at the time. This work responded to research that had demonstrated that the urban poor paid more for consumer goods than the more affluent middle class. In a theme that was pursued in later years by more explicit engagement with public choice, Trebilcock warned of the dangers that restrictive legislation could raise costs and restrict services for the urban poor. He also recognized that the good intentions were no guarantee that policies could not backfire and have the opposite effect.[13]

By 1975, Trebilcock was making greater use of economic analysis to explore the problems of consumer protection. He used the public choice analysis of Mancur Olson to illustrate the chronic problem of "the fragmentation of the consumer interest"[14] as

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[9] Ibid At 294.
[10] Ibid at 294. See also M.J, Trebilcock "Protecting Consumers Against Purchases of Defective Merchandise" (1971) 4 Adelaide L.Rev.12. at 16.
[11] Ibid at 41
[12] Ibid at40.
[13] David Cayne and M.J. Trebilcock "Market Considerations in the Formulation of Consumer Policy" (1973) 23 U.T.L.J. 396.
[14] Michael J. Trebilcock "Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?" (1975) 13 Osgoode Hall L.J. 619 at 624

opposed to the concentrated powers of producers. Concentrated groups of producers could obtain regulations such as market restrictions that helped them at the expense of consumer welfare. He warned "business (with the aid of the government) has now emerged as the chief subverter of the competitive economy which it claims to remember so fondly."[15] This shrewd observation rings only more true in light of the recent economic collapse.[16]

Although public choice analysis can easily produce deep and intractable pessimism- something signaled by a title blunting asking "Must the Consumer Always Lose", Trebilcock was imaginative, evidence- driven and committed in his search for ways to ways to fight the good fight. He tackled the problems of consumer protection not only as an evidence-driven scholar, but also as the National Vice President for the Consumers Association of Canada and the Chair of its advocacy committee. He even wrote a lay guide concerning consumer rights. [17] Michael put his mind where his heart was.

Even in this early scholarship, Trebilcock was cosmopolitan and innovative in his approach. He looked to American examples of consumer advocates, British consumer departments and Canadian subsidization of consumer groups to find the optimal mix of policies. Better legal aid, small claim courts and class actions were part of the solution and were in his view to be preferred over state-based mechanism that were more susceptible to regulatory capture. Nevertheless, unlike many lawyers, Michael never thought the enhanced access to adjudication could or should be the whole solution. The difficult task of improving the system required a creative use of all the branches of the government, [18] and of the charitable, media and private sectors and what today would be called civil society. Although he faced the difficult position of the consumer with a clear, sober and even somber realism, Michael's vision of the way forward was comprehensive and creative.

Even as he became increasingly attracted and schooled in economic analysis, Trebilcock never lost his lawyer's insight into the importance of procedure and the danger that procedure could in the real world defeat the substantive aspirations of any policy or law. In 1972, he concluded that "procedural reform must be regarded as the first priority in making private law remedies for misleading advertising effective". Such reform would require "major changes" in the legal profession and indirectly in the law schools. [19] He presciently articulated the danger that small claims courts could frequently be used as a means of debt collection and that they had difficulties providing assistance for uneducated consumers.[20] He looked to more radical alternatives that would see justice

[15] Ibid at 646
[16] See Owen Fiss "Trebilcock's Heresy" in this volume.
[17] M.J. Trebilcock *Help! A Marketplace Handbook of Consumer Rights in Canada* (Toronto: Canadian Broadcasting Company, 1978).
[18] He argued that "the teaching of Administrative Law in the law schools also needs to adjust to the real dynamics, and problems, of the regulatory process." Ibid at 638.
[19] M.J. Trebilcock "Private Law Remedies for Misleading Advertising" (1972) 22 U.T.L.J. 1 at 31
[20] ibid 13. For a later empirical validation of these concerns see Seana McGuire and Roderick MacDonald "Small Claims Court Cant" (1997) 34 Osgoode Hall L.J.509.

dispensed through phone or write an arbitrator schemes and the banning of all lawyers from small claim courts.

Looking primarily to the American experience, he also explored the role of class actions and private prosecutions, themes that he would revisit in later years. Publishing in the prestigious *Journal of Legal Studies* with Donald Dewees and Robert Prichard, Trebilcock provided an important economic analysis of how loser pay cost rules and restrictions on contingency fees inhabited the use of class actions as a regulatory device.[21] He advocated, to the dismay of established interests in the defendant bar, increased private enforcement of competition law, while recognizing that various procedural reforms were required both to facilitate such enforcement and prevent its abuse.[22]

With the early 1980's came a series of important publications that used public choice- the application of economic concepts to government- to provide an ambitious taxonomy of governance and its pathologies. Although not specifically labeled as access to justice scholarship, this work evolved and enriched the earlier work on consumer protection that had consistently seen increasing access to courts and adjudication as a radically underinclusive approach to the problems faced by the consumer. If the legislative and administrative branches of government were part of the solution, they had best be critically examined.

Written with Douglas Hartle, Robert Prichard and Donald Dewees, the 1982 monograph *Choice of Governing Instrument* analysed both the objectives of governments and the means used by them to achieve the objectives. It adopted a welfare economics perspective that saw the state's role as largely the correction of market failures such as externalities and monopolies. This built on the earlier work in public choice which had identified the difficulties faced by poorly organized and poorly informed consumers in both economic and political markets. They focused on the incentives faced by politicians, bureaucrats, interest groups and the media with a focus on the government's incentive to confer benefits on marginal voters.The report then examined a variety of means employed by government. As usual, Trebilcock's vision was wide if not eclectic. He examined not only the traditional fields of taxation, expenditures, regulation but also public inquiries. The conclusion was that that the choice of governing means was "interdependent"[23] with the choice of objectives.
Although the work in the early 1980's relied more heavily on economic analysis than the work in the1970's, it somewhat reluctantly concluded that it was ultimately naïve to think that economics- even progressive welfare maximizing economics- was the answer. Legislators and bureaucrats, no less than other actors, would seek to achieve their own ends. Alas, this reality could distort and even hijack the best intended policies.

[21] Donald Dewees, J.R.S. Prichard and M.J. Trebilcock "An Economic Analysis of Cost and Fee Rules for Class Actions" (1981) 10 J. of Legal Studies 155
[22] Kent Roach and M.J. Trebilcock "The Private Enforcement of Competition Law" (1994) 34 Osgoode Hall L.J. 363.
[23] M.J. Trebilcock et al *The Choice of Governing Instrument* (Ottawa: Economic Council of Canada, 1981) at 101.

Although he would later write that this work was unduly pessimistic and discounted the transformative potential of ideas, Trebilcock did not at the time ignore the possibility of a fundamental restructuring of powers. Perhaps written tongue in cheek or more likely in response to a critical external review, he observed that "like preachers, proselytizers, and psychotherapists, politicians clearly have some ability to propagandize the electorate on behalf of personal and initially unshared views". Nevertheless, he warned of the high costs "faced by political messiahs."[24]

The work on public choice in the 1980's also featured explicit discussion of the role of academics and other policy advisors to government. Trebilcock's work was much in demand by governments and think tanks. To his great credit, he devoted much thought to the role of the academic who ventured beyond the ivory tower. In 1982, he pointed out that the dangers of so many economists writing "as though their task was to advise the Prince rather than the public"[25] This represented Trebilcock's ambitions to increase public welfare. At the same time, his growing use of public choice revealed many of the dangers of advising the Prince- in particular the danger that welfare maximizing policies would be blocked or distorted by officials or politicians acting in their own self interest. This could be seen as a form of speaking truth to power, but it was also based on a sophisticated, albeit slightly jaded understanding of the constituents of power.

Trebilcock's intellectual pessimism about the possibility of reform to increase consumer protection seemed to increase in the early 1980's as his use of public choice analysis intensified. At the same time, his pessimism remained in considerable and creative tension with his relentless energy both in assisting the consumer movement and in writing about a broad range of problems faced by consumers and possible remedies. Michael saw all the dangers, but he kept searching for reform, albeit reform that was increasingly characterized as marginal and fragile.

The tension between Trebilcock's intellectual pessimism and his personal commitment to make a difference is partially resolved in a 2005 essay where he looks back on the *Choice of Governing Instruments*. He still maintains that public choice has "powerful, salutary and indispensible insights into collective decision-making", but Trebilcock now concedes that his 1982 version of public choice discounted the role of non-economic values such as ideology and ideas and the possibility of genuine non-incremental political change as represented by forces such as privatization and globalization.[26]

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[24] Douglas Hardle and Michael Trebilcock "Regulatory Reform and the Political Process" (1982) 20 Osgoode Hall L.J. 643 at 675

[25] Douglas Hardle and Michael Trebilcock "Regulatory Reform and the Political Process" (1982) 20 Osgoode Hall L.J. 643 at 677.

[26] Michael Trebilcock "The Choice of Governing Instrument: A Retrospective" in Hill and Howlett (eds.), *Designing Government* (McGill-Queens Press, 2005) at 54. See also Ninette Kelley "Ideas, Interests and Institutions" in this volume on Trebilcock's later recognition of the transformative potential of ideas.

Part Two: Accessible Justice & the Delivery of Legal Services

Trebilcock's early work on consumer protection and related issues of governance laid a solid and broad foundation for his work in later decades on access to justice. His consumer protection work meant that Trebilcock would not follow many scholars in conceiving of access to justice narrowly as access to courts and adjudication. It also meant that he would not follow many scholars by focusing on the problems of discrete and vulnerable groups of the type that would receive protection under s.15 of the Canadian *Charter of Rights and Freedoms*. Both with respect to justice and those who needed access to it, Trebilcock's vision is broader. To be sure, it highlights the priority of disadvantaged groups including the poor. At the same time, however, it also includes consumers and the middle class who suffered both from a lack of political organization and a lack of access to the many dimensions of justice.

Those who have focused on solutions to the question of access to legal services have tended to emphasize the recognition of a "right" to legal services. Such a right has been recognized in some criminal law contexts,[27] and in some family law and administrative law settings.[28] A number of scholars and advocates have argued that a similar logic applies in a variety of areas of civil justice, such as consumer protection discussed above, which feature litigants who cannot afford legal services.[29] The Canadian Bar Association has gone so far as to launch a *Charter* challenge in British Columbia asserting the right to legal aid in civil litigation settings.[30]

Behind every claim to a right, however, is a claim on resources. This is especially true in the context of access to justice and the delivery of legal services and Trebilcock was particularly sensitive to the reality that resources were not limited. As discussed above, he did not conflate access to the justice system with access to full representation by a lawyer or the "Ritz Hotel-style of justice."[31] As Rod MacDonald has elaborated in a manner that is quite consistent with Trebilcock's earlier work on consumer protection,

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[27] Though even here, there are disputes about when the state must provide legal services and the appropriate remedy for the failure to provide legal services that are essential for a fair trial.

[28] *New Brunswick (Minister of Health and Community Services) v. G(J)* (SCC) (1999). For the majority of the Court, a right to state funded legal assistance will be triggered by state action which imposes stigma akin to a finding of criminal guilt on an individual, or which threatens an individual's liberty interest.

[29] See MJ Mossman, "*New Brunswick (Minister of Health and Community Services) v. G(J):* Constitutional Requirements for Legal Representation in Child Protection Matters" (2000) 12 Canadian Journal of Women and the law 490; Patricia Hughes, "A Constitutional Right to Civil Legal Aid", in Making the Case: The Right to Publicly-Funded Legal Representation in Canada, Report of the Canadian Bar Association, February 2002; and Joseph Arvay, "Constitutional Right to Legal Aid", in Making the Case: The Right to Publicly-Funded Legal Representation in Canada, Report of the Canadian Bar Association, February 2002.

[30] The claim was dismissed by the B.C. Supreme Court on grounds that the CBA lacked standing. See *CBA v. B.C.* 2006 BCSC 1342. For a critique of the Court's approach, see L. Sossin, "The Justice of Access" (2008) UBC L. Rev.

[31] M. .J, Trebilcock "Protecting Consumers Against Purchases of Defective Merchandise" (1971) 4 Adelaide L.Rev.12 at 41.

access to justice may involve access to legal information, access to legal institutions, access to advice or simply access to a legal remedy.[32]

As the Supreme Court has dampened the prospects of a general right to legal representation in settings of civil justice,[33] the focus of the public interest bar has shifted from the right to government-funded legal representation to other access to justice initiatives, often led by non-governmental organizations. These measures range from Law Foundation funded articling positions,[34] to *pro bono publico* programs,[35] self-help and referral centres such as Law Help Ontario,[36] on-line public legal information like CLEONet,[37] and pro-bono clinics of various kinds (many situated at law schools),[38] as measures to reach those in need.

Of late, access has become synonymous with incenting social innovation, not simply the expansion of rights. Alongside the initiatives of the public interest bar to pilot initiatives which address access to civil justice, the private bar in Canada has also attempted to bring down the cost of legal services and tap the vast and underserved market for the middle-class. Promising ideas have included an on-line service which "auctions" legal work to the lowest qualified bidder,[39] and the development of firms which match individuals and small businesses with legal assistance they can afford,[40] and virtual law firms.[41] Networks of lawyers willing to offer subsidized (though not *pro bono*) legal services represent yet another model for reaching the middle-class.[42]

For innovation to flourish, however, other aspects of the justice system status-quo will have to change. These aspects include the business model for lawyers, the regulatory context for legal services and the legal aid system – in each of these settings, as we discuss below, Trebilcock has provided a provocative and constructive voice for reform.

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[32] Roderick A. Macdonald, "Access to Justice in 2003 – Scope, Scale, Ambitions" in J. Bass, W.A. Bogart & F. Zemans, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada/Irwin Law, 2005) 19.

[33] See *Christie v. B.C.*, [2007], 1 S.C.R. 873; see also *Little Sisters v Canada*, [2007] 1 S.C.R. 38.

[34] The Law Foundations of Ontario and British Columbia both fund public interest articling positions. Ten of the Ontario positions are part of a "Rural and Linguistic Access to Justice" initiative by the LFO.

[35] Most provinces now have pro bono service coordinating organizations (the first, Pro Bono Law Ontario, opened its doors in 2002).

[36] See http://www.lawhelpontario.org/.

[37] See http://www.cleonet.ca/.

[38] Examples include the International Human Rights Clinics at the University of Toronto, the Environmental Law Clinic at the University of Ottawa (U of O), the Mediation Clinic at the University of Windsor, the Osgoode Business Clinic at Osgoode Hall Law School, and numerous other pro bono, student volunteer clinics across the country.

[39] See http://www.dynamiclawyers.com/.

[40] See http://www.cognitionllp.com.

[41] See M. Kowalski, "More Virtual Law Firms Sprout Up" National Post (June 26, 2009) at http://network.nationalpost.com/np/blogs/legalpost/archive/2009/06/26/more-virtual-law-firms-sprout-up.aspx.

[42] See Lawyer's Aid Canada's "JusticeNet" website at http://www.justicenet.ca/index.php/directory/search/. Under this scheme, lawyers agree to charge $100/hour for their services and Lawyers Aid Canada markets and promotes those lawyers to people in need of their services.

Revisiting the Business Model of Lawyers

Trebilcock's work in the field of accessible justice, as in the case of so many other complex areas of policy, has concerned the interaction between public regulation and private enterprise. In particular, Trebilcock has focused on the needs to potential to deploy private incentives for lawyers to pursue public purposes.

A vivid illustration of Trebilcock's contribution to this field occurred with respect to contingency fees in Canada. Contingency fees involve the lawyer receiving no fee up front from a client or clients, but instead receiving a share of any potential recovery as compensation. In this sense, the lawyer obtains a share of the action, for this reason, contingency fees violate the common law torts of maintenance and champerty. These torts were once regarded as criminal conduct,[43] and are intended to redress damage caused by a person's trafficking in another person's law suit.[44] The interference in another's lawsuit by assisting one of the parties to prosecute or defend the claim is the tort of maintenance.[45] Champerty is a form of maintenance that adds the ingredient that there is an agreement to give the person who interferes a share of the proceeds or some other profit from the action.[46]

Initially, in Ontario, contingency fees were first permitted only in the context of class actions (by section 33(1) of the *Class Proceedings Act, 1992)*[47] Ontario courts began to appreciate that contingency fee and similar arrangements may be in the public interest because they facilitate access to justice. In *McIntyre Estate v. Ontario (Attorney General)*[48] for example, the Court of Appeal held that the prohibition against champerty should only apply to prohibit conduct that actually interferes with the administration of justice. Soon after the *McIntyre Estate*, the Law Society of Upper Canada amended its *Rules of Professional Conduct* to permit contingency fees for some types of litigation. Ultimately, the provincial government enacted legislation to legalize and regulate contingency fee agreements.[49] This legislation brought Ontario in line with other Canadian jurisdictions.

Writing at a time when Ontario was on the cusp of considering legalizing contingency fees, Trebilcock weighed into the debate, strongly on the side of enterprising lawyers who could, through contingency fees, enhance access to justice.[50] Indeed, Trebilcock would have gone further, permitting not just contingency fees but lawyers' indemnities

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[43] In Canada, maintenance and champerty were common law crimes until s. 8 of the *Criminal Code* (now R.S.C. 1985, c. C–46, s. 9) was enacted by the 1953–54, c. 51 amendments to the *Code*.
[44] *Tri Level Claims Consultants Ltd. v. Koliniotis* (2005), 257 D.L.R. (4th) 297 (Ont. C.A.); *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.).
[45] *Goodman v. R.*, [1939] S.C.R. 446.
[46] *Smythers v. Armstrong* (1989), 67 O.R. (2d) 753 (H.C.J.).
[47] S.O. 1992, c. 6.
[48] (2002), 61 O.R. (3d) 257 (C.A.). See also *Tri Level Claims Consultants Ltd. v. Koliniotis* (2005), 257 D.L.R. (4th) 297 (Ont. C.A.).
[49] *Justice Statute Law Amendment Act, 2002*, S.O. 2002, c. 24.
[50] Michael Trebilcock "The Case for Contingent Fees: The Ontario Legal Profession Rethinks its Position" (1989), 15 C.B.L.J. 360

against costs, to remove all risk from the plaintiff's side in civil litigation. Such arrangements provide incentives both for meritorious clients to pursue claims and for qualified legal counsel to undertake the risk of representation.

Have contingency fees in Canada led to claims proceeding which would not have otherwise? Do contingency fees demonstrate that access to justice for vulnerable litigants can also be profitable for enterprising lawyers? While all Canadian jurisdictions now permit contingency fee arrangements, there has been little or no research into their effectiveness in enhancing access to justice. What research exists in the context of contingency fees in class actions, however, suggests that the link between such arrangements and access to justice may be more tenuous than Trebilcock hoped.[51] The attractiveness of contingency fees to lawyers is also related to the quantum of damages which in some areas, such as *Charter* damage claims, have been quite modest and tied by some courts to costly proof of governmental fault.[52]

Other reforms to the business model of lawyers may have significant impact on access to justice, particularly in the civil justice realm. For example, Trebilcock has advocated the development of private insurance markets for legal expense coverage, especially in family law and civil matters. This approach accords well with his interest in access to justice for the poorly organized middle class. As he notes, while prepaid legal plans are not a new concept in Canada (they were advocated by the Law Society of Upper Canada at least as far back as 1993), but they have yet to penetrate significant markets.[53]

While the business model for lawyers presents barriers to access to justice, the regulatory context within which legal services are delivered arguably presents a more significant obstacle to reform.

Revisiting the Regulatory Context of Legal Services

A premise for the crisis of accessible legal services is the high cost of good quality legal services in the market. The premise for this premise is that the state has afforded the legal profession with a monopoly over entry into the profession, which includes significant educational requirements (including a law degree from an approved Canadian law school or equivalent institution), passing a series of licensing exams, and then once licensed, maintaining insurance, trust accounts and complying with the rules of professional conduct.

Trebilcock, in his address on the occasion of the 100th anniversary of the Law Society of Alberta,[54] reflected on the rationale for regulating legal services, and concluded as follows:

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[51] See, for example, Jasminka Kalajdzic, *Access to Justice for the Masses* (Toronto: LL.M. Thesis, 2009).
[52] See Kent Roach *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 2008 edition) ch.11.
[53] See Pierre Boucher. *Legal Expense Insurance Market Study*. Prepared for the Barreau du Quebec. March 2005. The Canadian situation may be contrasted with continental Europe where legal insurance has taken root. See, for example, Mattias Kilian. *Legal Expense Insurance – Germany's Funding Concept as a Role Model* Legal Services Research Centre International Conference, 2002
[54] M. Trebilcock, "The Regulation of the Market for Legal Services" (2008) 45 Alta. L. Rev. 215.

> The only normative reference point that is defensible is a consumer welfare perspective. That is to say, we ask of any set of policy choices, which one is likely to maximize net consumer welfare? This obviously entails balancing the benefits to consumers against both the public costs of administering the regulatory program in issue and the private compliance costs faced by regulatees. While this may seem a trite observation, in many fields of economic regulation there have been long-standing controversies over exactly whose interests the policies in question are designed to serve. These controversies also arise in the area of professional self-regulation, where there have often been ambiguities as to whether the purpose of self-regulation is to promote the interests of the profession itself and members thereof (a professional protectionist rationale), or to advance the interests of the public whom the profession and its members serve (a consumer protection rationale).

As Trebilcock notes, law is characterized by significant informational deficits on the part of the vast majority of demand in the market. People often do not know how to identify or diagnose their problems accurately, nor can they accurately estimate the cost to solving or redressing those problems. Another dilemma posed by the market for legal services is the risk of adverse externalities for third parties, where, for example, a custody dispute is inadequately argued.

Trebilcock treats legal services as a policy setting where we tend not to focus on choice of policy instrument. He sees a range of regulatory instruments as available to address quality assurance from a consumer welfare perspective in the context of legal services – both regulatory instruments featuring input regulation (e.g. academic qualifications, practical skills training, etc) and output regulation (e.g. oversight on the quality of services actually delivered, liability for professional negligence, etc).

As to the preferred mix of instruments, Trebilcock bemoans the absence of reliable empirical examination of what works, and the extent to which it works. In the absence of reliable data on the impact of input regulation, Trebilcock argues for "a more targeted, bottom-line, output-oriented regulatory focus, because that is what a consumer welfare perspective demands, particularly in segments of the legal services market that are particularly afflicted by information asymmetries."[55]

Trebilcock outlines a number of strategies which legal regulators could adopt, such as monitoring complaints for patterns of deficiencies of competence which could then be the basis of tracking, performance evaluation and quality assurance (whether through peer review or practice audit initiatives). Trebilcock also advocates a greater commitment to continuing legal education (CLE), including mandatory CLE in areas of practice of high risk to vulnerable clients. The Law Societies of Ontario, British Columbia and Saskatchewan have responded with limited mandatory CLE initiatives, but these are targeted in other ways (for example, in Ontario, the emphasis is on lawyers in their first

[55] Ibid, at p.19.

24 months of practice). For such CLE initiatives to bear fruit, however, more attention needs to be paid to the quality, pedagogy, and evaluation of CLE programs.[56]

Another reform to the regulatory context which could unleash innovation with significant potential for enhancing access to justice is that of unbundling. Unbundled legal services are provided when a lawyer accepts a retainer for a specific aspect of a case (for example, the drafting of a statement of claim), but not the entire case. Unbundled services allow clients who are not be able to afford to retain a lawyer for their entire case, or would like to have more involvement in their case, get expert advice and services on the areas of the case that are most challenging or that the client thinks are the most important; clients handle all other aspects of their case.

The Law Society's Rules of Professional Conduct, and the recent Supreme Court jurisprudence on solicitor-client relationships, however, suggests that once a lawyer assumes any role in representing a client, they have carriage for all aspects of the case.[57] While this doctrine was developed in the context of protecting clients' privilege and confidentiality from potential conflicts of interest, its adverse impact on access to legal services merits a reconsideration of its rationale. Other jurisdictions, such as the state of Washington, have specifically addressed unbundling in its conflict of interest rules on access to justice grounds. The Washington State rule exempts from its conflicts of interest rule, "A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided." [58] (and MT's public choice perspective would provide some basis for suspicions that the rules are in lawyers interests even when they are defended on the basis of the client interest- and perhaps add MT's article on multi disciplinary practices in Dal L.J.

Finally, Trebilcock has advocated for a greater role for paralegals in the delivery of legal services, at least in jurisdictions such as Ontario which has established a regulatory regime for licensing paralegals (including mandatory insurance, educational qualifications and disciplinary oversight).[59] While this might appear to represent a move contrary to the interests of lawyers, one of the motivations behind may well have been the forestalling of the kind of argument which found traction in UK and Australia regarding the legal profession's inability to protect consumers of legal services. In other words, even if the regulation of paralegals represents a threat to the market power of the legal profession, this concern might be outweighed by the longer term interest in self-

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[56] For a critique, see Richard Devlin and Jocelyn Downie, "And the Learners Shall Inherit the Earth: Lifelong Learning and Legal Ethics" (2009) at http://www.clp.utoronto.ca/Assets/lifelong_devlindownie.pdf.

[57] See *R. v. Neil*, [2002] 3 S.C.R. 631.

[58] See Washington State RPC Rule 6.5 Nonprofit and Court-Annexed Limited Legal Service Programs. The rule further provides that the lawyer must obtain the written consent of the client for the limited representation. The rule, in effect, relieves a lawyer of the duty to screen for potential conflicts of interest; a lawyer must still decline representation where there is a known conflict of interest.

[59] See http://www.lsuc.on.ca/paralegals/

regulation. It is also worth noting that regulation of paralegals has not yet led to a substantial expansion in the scope of practice permitted to paralegals.

Taken together, Trebilcock's proposed reforms to the regulation of the legal profession, and to the market for legal services more generally, would result in far more opportunities for the cost of legal services to be reduced. Trebilcock's approach remains vigilant in placing consumer welfare before the interests of producers - in this case lawyers - and recent reforms in Ontario with respect to contingency fees and paralegals suggests that reform to the delivery of legal services on consumer welfare grounds is possible. The market, however, can address only a share of the access to justice dilemmas we now face. The role of the public provision of legal services must also be addressed.

Revisiting Legal Aid

In his 2008 *Legal Aid Review*, Trebilcock reiterated that there is no "silver bullet" which will solve the problem of access to justice, his scholarship and policy advocacy are premised on the belief that innovation can substantially enhance access to justice and that a just, democratic and prosperous society depends on our realizing this potential.

Chronic underfunding of legal aid led LAO to cap expenditures on complex criminal cases in November of 2006,[60] and more recently to a boycott by criminal defense lawyers in the summer of 2009.[61] More state funding for legal aid, while clearly necessary in Trebilcock's view, may never be sufficient to address access to justice. Provincial legal aid budgets are devoted primarily to funding criminal defense representation for indigent clients as a matter of constitutional duty. It is highly unlikely that government would ever be able or willing to commit to funding all citizens without adequate means have effective legal representation in the civil justice system.

That said, the normative rationales for the ideal of access to justice apply with equal force to civil justice settings as to criminal justice. Trebilcock's work highlights the importance of the rule of law, equality and equitable distribution, the dignity of individuals and economic prosperity as the normative foundation for access to justice. He notes, for example, World Bank studies which have found that the rule of law accounts for nearly 60 per cent of a state's intangible wealth, and accessible justice forms an integral part of the rule of law.[62]

Legal aid was the subject of a case study in Ron Daniels and Trebilcock's study, *Rethinking the Welfare State: Prospects for Government by Voucher*.[63] Daniels and Trebilcock consider a range of options for the delivery of legal services, from direct public provision of services to reliance on the market through vouchers. Examining these

[60] For example, while big trials accounted for just 1 per cent of legal aid's criminal caseload in 2006, they accounted for 24 per cent of its budget.
[61] See T. Tyler, "Legal Aid Boycott Grows Over Paltry Paycheques" July 13, 2009, at http://www.thestar.com/News/Ontario/article/665029.
[62] Trebilcock pursues this theme in a recent study of rule of law reforms in the developing world. See M. Trebilcock and R. Daniels, *Rule of Law Reform and Development* (Edward Elgar 2008).
[63] (London: Routledge, 2005), pp.78-102.

models, they conclude that mixed systems such as Ontario, which feature both community clinics and vouchers which enable clients to seek out private lawyers, are the most efficient and most effective. While Ontario's legal aid system may appear to be a favourable model from a comparative perspective, improving the efficiency and effectiveness of that system represents one of Michael Trebilcock's signature aspirations.

Trebilcock served as the Research Director for the ambitious rethinking of legal aid in the review Chaired by Professor John McCamus in 1997 (the "Blueprint Report").[64] The Blueprint Report emphasized the importance of priority setting in allocating legal aid resources and the need for a broader range of delivery models for legal services to the poor. For example, one of the Blueprint Report's recommendations was that Legal Aid should seek to narrow the gap between full representation and no representation through provision of a much greater variety of legal services in order to assist a broader range of potential clients by invoking a wide spectrum of delivery mechanisms, including public legal education, duty counsel, supervised paralegals, Staff Offices, community legal clinics, judicare, and block contracting.

Further, the Blueprint Report emphasized that in choosing delivery models in particular contexts, priority should be given to early intervention, mediation, diversion, and referral to other community agencies. The Blueprint Report also explored the relationship between publicly funded legal aid and civil justice. McCamus recommended that the Ontario government should introduce legislation that allows for regulated contingent-fee arrangements for lawyers in Ontario and that the legal aid authority should coordinate efforts with its justice–system partners to establish a Contingency Legal Aid Fund for low-income Ontarians.

In his 2008 *Legal Aid Review*,[65] Trebilcock cautions that the legal aid system cannot be approached in isolation from the broader justice system. Rather, it should be viewed as an integral part of a broader strategy of progressive and incremental reform of the justice system at large. Returning to themes explored in the Blueprint Report, Trebilcock urges that legal aid resources should be expended in ways that facilitate more timely and more effective resolution of disputes. As discussed in part I, this approach follows from Trebilcock's insistence that access to justice be broadly conceived and not seen only as access to adjudication.

An underlying flaw with the current model of legal aid in Canada which was not explored in the Blueprint Report but has become a signature feature of Trebilcock's 2008 Legal Aid Review is the lack of connection between legal aid and middle-income groups. The legal aid system, overwhelmed with the needs of low income residents, has become a needs tested social program with little profile, relevance or resonance for the middle-class. This disengagement leads to a dangerous political vulnerability, as politicians court middle-class voters, and middle-class voters increasingly become invested in universal

[64] The McCamus Review was published as *Blueprint for Publicly Funded Legal Services*.. See http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/sumrec.asp.

[65] Trebilcock took over the 2008 Legal Aid Review from McCamus, who had been appointed to undertake the follow up review in 2007, when McCamus was appointed as Chair of Legal Aid Ontario later that year

programs such as public health care. This concern about political incentives builds on Trebilcock's earlier public choice work and takes him into territory- access to justice for the middle class- that many access to justice scholars neglect.

As Trebilcock argues, as fewer people qualify for legal aid, a larger number of people encounter a justice system which is remote, bewildering, and yet which is entirely dependent on their tax dollars to support. While publicly funded representation for all civil justice litigants in need may be unrealistic, a solution, Trebilcock contends in his 2008 Report, is for Legal Aid Ontario to address access to justice needs for the middle-class – to evolve, in other words, from a needs-based social benefit to a universal program of accessible justice.

Providing universal legal representation for the middle-class individual's civil litigation needs is neither tenable nor desirable (why should the public subsidize the decision of a particular individual to seek damages from a business partner or neighbor on grounds which may or may not be meritorious?). Trebilcock argues instead for deploying legal aid clinics to provide public legal information, summary advice and other limited legal services. He concludes that there should be a "more integrated system for providing low-cost information and summary advice services to a broader range of citizens than is currently available."[66]

Tellingly, the recommendation for Legal Aid clinics to engage the middle class represented the aspect of the 2008 *Legal Aid Review* to attract the most media attention.[67]Since most middle-class citizens will have little direct contact with the criminal justice system, the focus on access to justice for the middle-class focuses on the unmet civil justice needs. Trebilcock sees innovations to address the civil justice needs of the middle-class as an example of the way in which Legal Aid Ontario must be more "strategic" and "experimental" in its approach to service delivery. For example, he suggests that staff duty counsel could be deployed, where feasible, to provide more, and more varied, pre-litigation services, especially in family law. The focus on the middle class in the Legal Aid Review in a sense brings Trebilcock full circle and back to his 1970's work on consumer protection.

Innovation for Trebilcock focuses not just on expanding the constituency with a stake in legal aid but also on expanding the reach of legal aid to the indigent. He recommends, for example, that clinics and family law offices provide integrated, holistic services to clients, particularly in settings where there is serious difficulty for litigants to find lawyers to accept legal aid certificates (e.g. child protection matters or in rural communities). Moving beyond conventional clinic and legal service offices, Trebilcock argues that LAO must be willing to experiment with new, innovative ideas.

[66] Supra note 2, at p.88.
[67] See J. Hall and T. Tyler, "Legal Aid Urged for the Middle-Class" *Toronto Star*, July 26, 2008. The other aspect of the Report of interest to the media was the legal aid tariffs paid to lawyers, which Trebilcock argued should be substantially increased.

Building on empirical studies from other jurisdictions, particularly the U.K., which demonstrate how individuals' problems often come in clusters, he argues that legal services in a silo cannot address the way in which legal problems either cause or are caused by a cascade of other problems (social, medical, financial, etc). Early intervention with integrated services would reduce costs by pre-empting this cascading effect. Trebilcock recommends a "a more holistic or integrated institutional response where individuals with clusters of interrelated problems are not subject to endless referral processes that are tied to particular institutions"[68]

In this respect, a reconceptualization and broadening of the mandate of the clinic system may be an important first step along the path to greater integration in the provision of legal aid and related social services. There is also considerable potential for integrated service delivery by the other staffed components of the system, namely, duty counsel and criminal and family staff offices. Trebilcock cites LAO's SOAP initiative (Simplified Online Application Portal), which directly involves social service agencies in the certificate applications process, which could become an important platform for an integrated referral network. The Family Law Information Centres (FLICs) could be the entry point for integrated services which intersect the family justice system.

Beyond publicly funded services delivered through LAO, Trebilcock concludes his 2008 Legal Aid Review by suggesting greater coordination and systemic efforts are needed to coordinate the various initiatives discussed above (e.g. public legal education materials, summary advice services, etc). Trebilcock points to peer jurisdictions such as the United Kingdom and the United States, which deliver a range of services by means of citizen advice centres, and employ technological solutions involving websites or telephone hotlines.

Conclusions

Trebilcock's focus on consumer welfare in the context of legal services drives a progressive search for equality of legal representation. While Trebilcock's focus on additional resources, integrated services and innovation in how legal services are delivered through the legal aid system is persuasive, his claim that legal aid should appeal more directly to the middle class merits greater reflection.

Does it make more sense to inject resources into a system such as family law justice that imposes undue cost, delay and uncertainty on parties, or to invest those resources in new models of dispute resolution, such as administrative tribunals and commissions, and preventative services? Trebilcock observes,

> My own tentative impressions are that unlike national defence or police services, most civil justice services can be priced and rationed. On the other hand, there may be major positive externalities from the provision of civil justice, such as providing an avenue for redressing grievances in a socially non-disruptive fashion (i.e., writs rather than rifles), and that a tightly co-ordinated and hierarchical

[68] Supra note 2, at 80.

> system of civil justice provides some measure of consistency and predictability in decision-making by generating and interpreting legal rules which other parties can rely on as precedents in shaping their own conduct.[69]

It is not clear why the court system, with all of its inherent "silo"ing tendencies (courts, for example, have a very limited range of remedies for providing integrated service remedies) would be preferable to a public system of dispute resolution. Several other areas of dispute resolution involving parties of limited means have moved from the courts to tribunals (for example, Ontario's Landlord Tenant Tribunal now bills itself as Canada's highest volume dispute resolution body, handling somewhere around 70,000 matters annually),[70] and where necessary, to tribunals complemented by other administrative bodies capable of undertaking early dispute prevention, public education and other proactive measure, such as the Ontario Human Rights Tribunal and Ontario Human Rights Commission (complemented by a public legal assistance service for applicants).

Tribunals offer compelling efficiencies, from limits on procedural delays to adjudicators with specialized skill, the absence of cost shifting and other disincentives to plaintiffs. As with so many other areas of access to justice, however, a significant barrier to fundamental reform remains the absence of reliable empirical data. We lack a well justified set of performance benchmarks which could be applied to measure the effectiveness of administrative tribunals versus courts? That said, the ability to target particular policy objectives in the establishment of a tribunal may make this option better suited to specific areas of vulnerability such as consumer protection and at least some areas of family law.

Moving in this direction, we argue, flows from the logic which Trebilcock has set out. As the following passage from his study of "The Regulation of the Legal Profession" demonstrates, to date, Trebilcock has approached the problem of civil justice as one of shifting resources within the system, and to shifting disputes to alternative dispute resolution such as mediation and arbitration aimed at settlement:

> From a law and economics perspective, in the present and other contexts, virtues are often seen in simply creating socially appropriate incentive structures and letting individuals make choices, in this case as to which institutional avenue of redress to pursue in the light of this incentive structure. In other words, pricing mechanisms are often preferred to command-and-control forms of regulation. In the present context, to the extent that we believe that the formal court system is both overburdened and over-utilised from a social perspective, I would argue that the presumptive response should be to price the services provided by this system at fully allocated social cost so that all litigants utilising the system perceive not only their private costs but also the full social cost of the services provided. This is likely to have at least two effects: in many cases to induce settlement rather than litigation, and in other cases to utilise alternative forms of dispute resolution

[69] Trebilcock, Regulation of Legal Services, supra note 48, at p.28.
[70] See http://www.ltb.gov.on.ca/en/index.html.

> as a substitute for formal litigation. With respect to the second alternative, we need to ask, following my discussion of the public goods aspects of the provision of civil justice, whether inducing parties to rely on alternative forms of dispute resolution, including importantly private forms of dispute resolution, may compromise some of the public goods aspects of public provision. For normal two-party commercial and related litigation, it is not obvious to me that this is so. However, given that the determinations made by these alternative forms of dispute resolution must ultimately be enforced by the state, through the public courts, we need to think clearly about what forms of public supervision are required of these private alternative forms of dispute resolution. Once could imagine *ex ante* certification by the legislature or some other public agency of these mechanisms, either with respect to the required qualifications of the arbitral personnel or the processes of decision-making that must be employed or both. Instead, or as well, one could imagine *ex post* judicial supervision, through rights of appeal or judicial review, although here, to the extent this *ex post* judicial oversight.[71]

However, the idea of a specialized tribunal to deal with consumer disputes, family disputes, or other high volume areas of civil justice, may well address the concerns Trebilcock has highlighted while preserving judicial supervision to ensure consistency and adherence to overarching legal standards. Indeed, Trebilcock has recognized the shift toward specialized courts as a positive development,

> While it appears to be contrary to trends towards consolidating formal judicial adjudication into a general court system, it seems to me possible that some savings in costs (and possibly delay) could be achieved by greater specialisation in adjudicative functions (for example, a specialised commercial law court or a specialised family law court). This in turn is likely to lead to a more specialised Bar. Greater specialisation in turn is likely to lead to a higher rate of pre-trial settlement, simply because a higher level of specialised expertise on the part of advocates and judges is likely to reduce the degree of uncertainty about adjudicated outcomes.[72]

Specialized tribunals, combined with specialized clinics, could also take a more holistic approach than the ordinary generalist courts and play a pro-active role in helping people recover from potentially debilitating problems and disputes.

Determining the proper mix of standard-setting, enforcement, public education, and dispute resolution, Trebilcock concludes, should be the subject of a rational and integrated analysis. In this sense, Trebilcock's 2008 Legal Aid Review ends where his signature studies of regulatory choice began.

[71] Trebilcock, "The Regulation of the Market for Legal Services" supra note 48, at p.40.
[72] Ibid.

Part Three: What Trebilcock's Scholarship Can Teach Us About Regulatory Choices & the Future of Accessible Justice

Although many would not immediately characterize him as an access to justice scholar, Trebilcock has made rich contributions to both the scholarship and policy of access to justice in Canada. In this concluding section, we will briefly outline some of the themes from Trebilcock's work that should help inform future access to justice scholarship and policy-making.

From Consumers to the Middle Class

A relatively straight line can be drawn from Trebilcock's work on consumer protection in the 1970's to his 2008 Legal Aid Report that perhaps vainly sought to give the middle class a stake in the legal system and legal aid. The person who in the early 1970's worried that the poor could see the law and lawyers as alien and hostile, now has extended these concerns to the middle class.

Trebilcock's focus first on consumers and later on the middle class distinguishes his access to justice work from many who have focused on problems of access to justice for disadvantaged groups. The focus on consumers and the middle class is consistent with a public choice approach which posits that such poorly organized and dispersed groups will be at a disadvantaged compared to concentrated groups including some well-organized minorities. It would, however, be a mistake to think that Trebilcock focused on consumers and the middle class to the exclusion of other groups. His vision is an inclusive one. The rule of law is a universal right and precondition for a democratic and prosperous society, not a privilege which should be available only to those with sufficient resources to access it.

Trebilcock's scholarship raises the question of whether future access to justice scholars should also include the middle class in their studies. Although he has not made these claims, some influenced by public choice analysis have argued that unorganized groups such as consumers and the middle class may actually suffer more disadvantages than minorities who are organized.[73] Leaving aside this controversial claim, in our view, it should be uncontroversial that access to justice studies should include the middle class and their problems. Such an approach would allow scholars to revisit practical problems concerning consumer goods and financial services[74] that are experienced by the middle class as well as the poor and disadvantaged groups. It would also force scholars to consider, as Trebilcock has done, the need for broader political coalitions to make access to justice a vital force.

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[73] Bruce Ackerman "Beyond Carolene Products" (1985) 98 Harv.L.Rev 713. For further discussion see Roach "The Problem of Public Choice: The Case of Short Limitation Periods" (1993) 31 Osgoode Hall L.J. 721.

[74] Writing in 2003, Trebilcock presciently noted that there may be a "genuine consumer protection problem" because past regulation of the financial sector may have misled many consumers about the "many risky financial instruments" now sold by banks. Michael Trebilcock "Rethinking Consumer Protection Policy" in C. Rickett and T. Telfer eds. *International Perspectives on Consumer Access to Justice* (Cambridge: Cambridge University Press, 2003) at 71.

Realism and Engagement with the Political System

Trebilcock's access to justice scholarship is striking in its realism about the political system. His use of public choice analysis has helped him to understand how a variety of political and organizational interests will shape and distort the best intentioned reforms. Such realism about politics could easily degenerate into cynicism. Trebilcock has managed to avoid this danger.

From the early 1970's to the present, he was effectively warned those interested in reform that they cannot avoid engagement with the political system, warts and all. He has little time for those who stop at their ideals, whether they involve radical redistribution of wealth or perfect markets. Ideals must be tempered by the compromises and constraints that come with political engagement. The fine balance that must be struck is not losing one's ideals while seeking reforms in a practical and politically realistic manner. If future access to justice scholars want to come close to making the many policy contributions that Trebilcock has made, they will have to engage, albeit realistically and cautiously, with the political system.

Economic Analysis Harnessed for Progressive Ends

Many papers in this symposium have discussed how Trebilcock has been able to use economic analysis for progressive ends.[75] Although there are dangers with casual engagements with any discipline, especially one as complex as economics, economic analysis should be encouraged in access to justice studies. This suggestion reflects the reality that increased access to justice will require either more resources to be devoted to the justice sector or more likely the re-distribution of existing resources. Justice does not come cheap. Access to justice scholars ignore the costs of their reforms at their peril. Moreover, access to justice scholars must face the trade-offs between resources for justice and other goods such as health care. In short, they must keep the eyes on the big picture.

There is also a practical need to measure the costs of refusing to reform the current system. To return to another constant theme in Trebilcock's research, there is a need for more evidence. In particular, there is a need for more evidence about the costs and externalities of the status quo. For example, what costs do unrepresented litigants impose on the courts and other litigants? What costs do inexperienced lawyers impose on the length of complex mega trials? How does Canada fare in comparison to other countries when it comes to access to justice? What are the costs in terms of lost productivity and even wasted lives of a legal system that makes it difficult for the middle class to litigate to resolve wrongful dismissal suits, catastrophic accident claims or the range of family law matters? A question that deserves to be answered is how much it costs us to retain present inefficiencies.

[75] In particular Fiss "Trebilcock's Heresy"

Thoughtfulness about the Role of Academics

Another striking feature of Trebilcock's work is it thoughtfulness about the role that academics play within the policy process. As usual, Michael's approach is characterized by a good dose of hard- headed realism that at times verges on pessimism. Individual academics ultimately have to decide for themselves what, if any role, they wish to play in the policy process. Nevertheless, they would all do well to emulate Trebilcock's example of rationally analyzing this issue as they make and revise their decisions throughout their careers. It is dangerous to hop from assignment to assignment and from article to article without considering basic questions about the purposes, goals and uses of academic research.

Innovate and Challenge Conventional Wisdom and Vested Interest

Another fundamental attribute of Trebilcock's access to justice scholarship is its willingness to innovate and take on vested interests. This is particularly true of the legal profession. Trebilcock has been highly critical of restrictions on entry and other forms of input as opposed to output regulation undertaken by the legal profession. [76] He has made the case for allowing easier access to the profession and for allowing lawyers to work with other professionals.[77] He has warned that regulations often taken in the name of consumer welfare can have the opposite effect and impose net costs of the consumers of legal services. Public legal education and informal means of dispute resolution are for Trebilcock promising means to avoid and resolve disputes given that most people rationally want nothing to do with expensive lawyers or courts. [78]

The legal profession and law schools will have to fundamentally change if law is not simply to be a coercive instrument that takes things from the poor and increasingly the middle class and if lawyers are not to continue to engage in a costly, long and inefficient "full court press" .[79] As was the case with his critical analysis of the role of academics in the policy process, Trebilcock has not spared himself or his colleagues from his realism about how self- interest shapes and distorts welfare maximizing policies.

Do No Harm: Collect More Evidence

Lawyers can learn much from other professions and disciplines including the medical profession.[80] One of the fundamental dictates of medicine is that treatment should not

[76] Michael Trebilcock "Regulating Legal Competence" (2001) 34 Can. Bus.L. J. 444.
[77] Michael Trebilcock and Lilla Csorgo "Multidisciplinary Professional Practices: A Consumer Welfare Perspective" (2001) 24 Dalhousie L.J. 1.
[78] Michael Trebilcock "Rethinking Consumer Protection Policy" in C. Rickett and T. Telfer eds. *International Perspectives on Consumer Access to Justice* (Cambridge: Cambridge University Press, 2003) at
[79] Michael Trebilcock and Lisa Austin "The Limits of the Full Court Press: Of Blood and Merger" (1998) 48 U.T.L.J. 1.
[80] For an example of Trebilcock's use of insights from the field of public health or epidemiology to justify creative approaches to improving traffic safety see M.L.Friedland, M.J. Trebilcock and Kent Roach

cause more harm than it alleviates. Starting from the 1970's, Trebilcock recognized the dangers that well-intentioned reforms designed to improve access to justice could actually make things worse. Harmful effects could occur because the reforms were misconceived and/ or because their delivery was distorted by pre-existing interests.

A corollary of the do no harm principle is the need to collect evidence to measure the costs and benefits of various interventions. Almost all of Trebilcock's access to justice research includes a careful survey of existing data, warnings about the inadequacy of that data and calls for the collection of more data. All of this is uncontroversial, but it does beg the question of why more data is not collected. Borrowing some of Trebilcock's realism, we would suggest that there is a need to consider the political economy of research and academe in explaining the constant data gap in policy studies. We would also underline the reality that even the most robust data sets will be subject to competing interpretations. Here, as in the policy world in general, there may be no escaping politics.

Think Big: Placing Access to Justice into its Broader Context

A final lesson that we take from Trebilcock's access to justice scholarship is the need to constantly place access to justice into the largest context possible. Michael has avoided the dangers of conceiving access to justice narrowly as access to existing legal services or access to adjudication. His constant watchword was to exploit all options in the pursuit of marginal reforms. This search required him not only to propose reforms for increasing access to courts through measures such as small claims courts, class actions and contingency fees, but also to pay serious attention to how groups could obtain justice from the legislative and administrative branches of governments.

Trebilcock's vision did not stop with a legal process focus on the different branches of government but extended to the market and civil society. From the start, he was attracted to empowering individuals to engage in self-protection and self-help. Hhis skepticism about regulation as the universal answer was coupled with a healthy respect for the choices made and circumstances by ordinary people. The Trebilcock big picture approach also demands attention to trade-offs between access to justice and access to other goods, a trade off that is complicated by his more recent attention to the less developed world. Indeed, Trebilcock has suggested that his work on international trade can be seen as the logical extension of his earlier work on consumer protection given the harmful effect of trade barriers on consumers.[81]

Perhaps the overriding lesson of Michael Trebilcock's scholarship is the need to place the issue of access to justice into a broader, critical and distributive context. One should be prepared to exploit all available options in the good fight to promote welfare. At the same time, scholars and policy-makers alike should be realistic and cautious. They should

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Regulating Traffic Safety (Toronto: University of Toronto Press, 1990). See also Don Dewees, David Duff and Michael Trebilcock *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford: Oxford University Press, 1996).

[81] Michael Trebilcock "Consumerism in the Nineties" (1991) 19 Can. Business L.J. 412 at 434-435.

collect the necessary empirical data to ensure that their well intentioned reforms actually work, or at least do no harm.