

COORDINATING ACCESS TO JUSTICE FOR LOW- AND MODERATE- INCOME PEOPLE

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INTRODUCTION

The American justice system is vast, complex, varied and dynamic. We are a large country and legal problems are ubiquitous. Each year, about half of all households experience at least one problem for which the advice of a lawyer is sought or desired.¹ So, at least 50,000,000 times each year, American families look down a road that could lead them to the American justice system.

Many turn away from that path, abandoning potential legal claims without much consideration. Some who turn away do not think the journey will lead them where they want to go. Others think the trip too arduous.² Then there is a group that begins to pursue their rights. Some of those folks turn back or get lost; others persevere with the help of a lawyer while another subset of those seeking legal redress

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1. See Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531 (2013) (discussing the magnitude of legal needs); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010) (analyzing data on legal need and legal services).

2. See Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 101 (2013) (reviewing data on barriers to access to justice); Herbert Kritzer, *Examining the Real Demand for Legal Services*, 37 FORDHAM URB. L.J. 255 (2010) (presenting and discussing descriptive data on the choice to seek counsel for a legal need).

find their way to the courthouse without a lawyer. Those unrepresented litigants must rely upon themselves and what guidance they can get from the courts. Too many people face too many barriers when they need access to justice in America.³

In recent years, there has been renewed attention to the problem of access to justice for low- and moderate-income Americans. Efforts by federal,⁴ state,⁵ and private actors⁶ have blossomed. While there are many important discussions about the many ways the law could be improved and more resources devoted to the justice system, other important work focuses more on the experience of seeking justice in American courts and looks to the courts' powers to reform their own practices, procedures, and local rules. Important as legal reform—

3. See Ian Weinstein, *Access to Civil Justice in America: What Do We Know?*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS 3, 4 (Samuel Estreicher & Joy Radice eds., 2016) [hereinafter BEYOND ELITE LAW] (discussing supply and demand for legal services and concluding that there is a significant gap in access to justice for individuals and families of low- and moderate-income).

4. In 2010, the United States Department of Justice created the Access to Justice Initiative “to address the access-to-justice crisis in the criminal and civil justice system.” *Access to Justice*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atj> (last visited Apr. 1, 2017).

5. More than thirty states have established Access to Justice Commissions or other groups focused on facilitating access to civil justice. *Access to Justice Commissions*, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions.html (last visited Apr. 1, 2017). For a discussion on access to justice issues across the nation, see *Access to Justice for Low-Income People: Recent Developments August 2011–January 2012*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_ccj_report_jan2012.authcheckdam.pdf (last visited Apr. 1, 2017). One of the most active state groups in recent years has been the New York Task Force. See *Permanent Commission on Access to Justice*, N.Y. ST. UNIFIED COURT SYS., <http://www.nycourts.gov/accesstojusticecommission/index.shtml> (last visited Apr. 1, 2017); see generally Helaine M. Barnett, *New York State Task Force to Expand Access to Civil Legal Services*, in BEYOND ELITE LAW, *supra* note 3, at 343; Victoria A. Graffeo, *New York’s 50-Hour Pro Bono Requirement*, in BEYOND ELITE LAW, *supra* note 3, at 359.

6. See, e.g., PETER L. MARKOWITZ ET AL., STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS (2011), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf; NABANITA PAL, BRENNAN CTR. FOR JUSTICE, FACING FORECLOSURE ALONE: THE CONTINUING CRISIS IN LEGAL REPRESENTATION (2011), http://www.brennancenter.org/sites/default/files/legacy/Facing_Foreclosure_Alone.pdf; see also JOY MOSES, CTR. FOR AM. PROGRESS, GROUNDS FOR OBJECTION: CAUSES AND CONSEQUENCES OF AMERICA’S PRO SE CRISIS AND HOW TO SOLVE THE PROBLEM OF UNREPRESENTED LITIGANTS (2011), <https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/objection.pdf> (reporting on the *pro se* crisis); *Resource Center for Access to Justice Initiatives*, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html (last visited Apr. 1, 2017).

changes in statutes, regulations, and case law—is to the access to justice movement, the problem also presents rich opportunities to reap the benefits that flow when actors in complex social systems have better access to information about lower level, less visible decisions. Statutes and cases are generally more visible than local rules, policies, and practices, which are much harder to see, learn about, assess, or adopt. Yet many of the barriers to access to justice are matters of administration and management of this sort.

Game theory offers a useful model to understand the power of improving communication about norms and expectations among actors who must work together in certain kinds of complicated systems. The agglomeration of courts and agencies that make up the justice system is being improved by information sharing designed to help judges, court staff, litigants, politicians, and others row in the same direction. Everyone agrees that there should be fewer and lower barriers to access to justice in America. How can the disparate actors in that complex system best coordinate to achieve shared goals, particularly given the absence of unified controlling structures or efficient channels of direct communication among all those players?

This paper proceeds in three steps. First, it describes the vast, complex, varied, and dynamic landscape of the American justice system and argues that the promise of top-down change is limited by the design of our justice system. While the scope of the system is a contingent but still significant factor that makes high-level change hard, complexity, variation and dynamism are all intentional qualities, deeply embedded in the system by its designers. Federalism and the reflexive distrust of centralization from which that idea springs, make our justice system resistant to universal reform by high-level changes in law, whether they might flow from congressional, executive, or Supreme Court action.⁷

Second, the paper applies a simplified game theory model to the problem of access of justice. Drawing on a few ideas from Thomas Schelling's classic book, *THE STRATEGY OF CONFLICT*,⁸ if the justice

7. High-level change requires political will, political power, and a mechanism. While mechanisms for high-level reform are limited by structural features flowing from the horizontal and vertical divisions of our governing bodies, the more pressing current concern is about the lack of political will to continue federal efforts to improve access to justice. While this paper describes a general phenomenon, the current political climate foregrounds the importance of coordination efforts. Information sharing and certain kinds of technical benchmarking remain, for now, reasonably non-partisan.

8. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1980) (exploring the extension of game theory from zero sum to non-zero sum games, the role of explicit and

system can be modeled as a multi-player system with limited information flow in which actors look for and respond to signals about desirable norms and practices, the significance of focal points, or widely shared assumptions about paradigm cases, comes to the foreground.

With that understanding, this paper closes with discussion, and some comparison, of access to justice initiatives. Looking at two different benchmarking efforts, this paper highlights how work to share information, create widely shared baselines, and educate the broad range of actors in this vast, complex, varied, and dynamic system is particularly well-suited to addressing the American justice gap.

I.

A BIG AND HARD PROBLEM

The problem of access to justice for low- and moderate-income people is vast in scope. Looking at the demand side, tens of millions of legal problems arise each year in low- and moderate-income households. While the wealthy have ready access to lawyers, courts, and alternative dispute resolution fora, those of lesser means⁹ face challenges. Families with moderate incomes seek legal advice or go to court to resolve about half of their legal problems. The problem is worse for low-income households. They access lawyers or courts for only about twenty percent of their problems, yet they face more legal

implicit information in developing and executing strategies in games with multiple equilibria, and introducing the idea of focal points or shared norms and ideas in structuring games in which players do not communicate directly). Dr. Schelling won the Nobel Prize in Economics in 2005 and died in December 2016. *See* William Grimes, *Thomas C. Schelling, Master Theorist of Nuclear Strategy, Dies at 95*, N.Y. TIMES, Dec. 14, 2016, at B14.

9. The federal test for eligibility for representation by a Legal Services Corporation- (LSC) funded program, a reasonable surrogate for a low-income household, is whether one has an income at or below 125% of the federal poverty level. In 2009, 56.8 million Americans lived in eligible households. Additionally, more than 55 million Americans who were over sixty years of age in 2009 also qualified for some LSC-funded programs. *See* REBECCA L. SANDEFUR & AARON C. SMYTH, AM. BAR. FOUND., ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT (2011), http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf. There is no single definition of moderate-income households in the access to justice literature. There were 122,459,000 households in America in 2012, and their median income was \$51,017. Sixty percent of households had incomes of \$64,582 or less. Eighty percent of households had incomes below \$104,096, and only five percent of households had incomes of \$191,157 or greater. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, at 9 (2013), <https://www.census.gov/prod/2013pubs/p60-245.pdf>.

problems than those of moderate means.¹⁰ Millions more low- and moderate-income Americans would use the legal system each year if they had better access to lawyers and if courts and other formal processes were more accessible to people without legal training.¹¹

The differences in access among different classes of people and the large unmet need among moderate- and low-income people is a large problem in at least two ways: it affects a lot of people and it compromises a very important and fundamental shared value. The American justice gap is both quite material—many people are affected—and ideal—our norm of equal treatment under law is deeply challenged. While it is crucial for us to better understand what Americans need from the legal system today, and how we can better meet those needs, the overall picture is clear: there is a big gap in justice among different classes of people, and there is a big gap between our aspirations for access to justice in America and our current ability to give all Americans access to the law. It is a gap that swallows tens of millions of people each year. While that is a problem of daunting scope, it is not the only challenge this landscape presents.

The justice gap is not only very large, it also presents a lot of challenging terrain that makes the path to justice difficult. At the start, there is the complexity and obscurity of the law. The system developed with the assumption that most people would have a lawyer to guide them. This feature of the terrain is daunting enough and it poses a maze through which the uninitiated may wander forever. However, thinking of a single maze or a tangle of thickets does not begin to capture the complexity of the problem. To non-lawyers, and even to lawyers who stray too far from their expertise, the law presents many thickets, easily confused with each other. At base, this is an issue of matching the problem, that an individual faces with the substantive and procedural legal resources through which it might be solved.

Consider the situation of a family whose home is damaged in a natural disaster. Perhaps they categorize this challenge as only a natural disaster and rebuild on their own. Or maybe they learn of disaster assistance but are denied because they cannot prove ownership of a

10. Weinstein, *supra* note 3, at 6 n.22–33 (citing AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994) (reviewing data from the last comprehensive national study and from more recent state and LSC studies showing differences between moderate- and low-income households in the types, frequency of, and responses to legal problems)).

11. Rhode, *supra* note 1, at 533–35 (discussing sources and data for analysis of legal needs or demand side for legal services); Sandefur, *supra* note 1, at 56–60 (same and concluding that legal problems are very common but responses within the legal system are not).

home that has been in the family for many years. Some in this situation will not conceive of or choose to seek legal redress. Perhaps they do not know the decision is subject to legal review or perhaps they are skeptical that they will get satisfaction.¹² The subgroup that recognizes their problem as having a legal aspect and are motivated to use the law face challenges in access at this stage. Do they seek the advice of a probate, insurance, or property law specialist? Is the problem best seen as a federal administrative law issue, addressing the regulations that control the benefits, or do they need to quiet title in state court and then reengage with the benefit program? The decision path is challenging for many lawyers, let alone those who cannot access legal advice.

Beyond the complexity of the law, those who fall into the justice gap must also contend with the procedural complexities of the American legal system. Most lawyers are habituated to the intricate court systems we have devised out of our American dedication to divided power and multiple levels of government. But it is not intuitive to most people to have federal, state, and local courts, as well as administrative tribunals, at each level of government. Each of those courts has its own structure, leadership, and procedures.

One need not even seek a detailed map of the court system before encountering bewildering complexity. Of course, there are some areas that are clear and easy to grasp. There are currently 860 federal judges permanently appointed under Article III of the Constitution. There are 663 district court judges, 167 judges on the courts of appeal, 12 Federal Circuit Judges, 4 Territorial Judges, 9 judges on the Court of International Trade, 16 Court of Federal Claims Judges, and 9 Justices of the United States Supreme Court.¹³ Our Article III federal courts are clearly and uniformly structured. They sit in a simple, well-defined judicial¹⁴ and administrative hierarchy.¹⁵ But even in this carefully tended land, the view is sometimes obscured.

12. See generally Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016) (reporting results of a study suggesting that poor people and people of color avoid the civil justice in disproportionate numbers because of negative perceptions of its legitimacy).

13. *Authorized Judgeships—From 1789 to Present*, U.S. COURTS, <http://www.uscourts.gov/sites/default/files/allauth.pdf> (last visited Apr. 1, 2017).

14. There are also 10 judges in temporary district court judgeships, meaning there are actually 673 total district court judges sitting in 663 permanent and 10 temporary judgeships. *U.S. District Courts: Authorized Temporary Judgeships*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/district-temporary-judgeships_0.pdf (last visited Apr. 1, 2017). The temporary judgeships are long-term and the judges enjoy all Article III protections. *Id.*

While the number of authorized judgeships is clear, the number of sitting federal judges is harder to determine. A significant number of judges continue to hear cases as senior judges.¹⁶ Senior federal judges make a considerable, but somewhat hidden contribution to the work of the federal courts. Even where structure is clearest and data collection quite strong, it is hard to get a clear picture of the workings of the justice system.

Once we turn our gaze to the state courts, where almost all cases are heard, we see great complexity, variation, and dynamism. The basic task of counting state courts and their caseloads is confounded at the highest level by the existence of two different kinds of courts. Forty-three states have dual tier court systems combining courts of limited jurisdiction and courts of general jurisdiction.¹⁷ In the dual tier states, some cases start in a court of limited jurisdiction and are then refiled in a court of general jurisdiction while other cases stay in the limited jurisdiction courts and yet other cases are initiated in the courts of general jurisdiction. A significant number of cases are filed, and counted, twice.

Seven states, including California, have a single-tier system. In these states, cases are not routinely sent up or down between inferior and superior courts. Beyond the complexities of actually navigating these disparate systems, the variation in structures makes the seemingly simple project of counting and comparing caseloads quite challenging.

The National Center on State Courts (NCSC) reports that there were 94.1 million incoming cases in the state courts in 2013.¹⁸ Fifty-one point one million were traffic matters. Of those traffic matters, 9.3 million were filed in single-tier states. The remaining 41.8 million were filed in two-tier systems, with the vast bulk of the cases, 38.9 million traffic cases, filed in courts of limited (often singular) jurisdic-

15. See generally *Judicial Administration*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/judicial-administration> (last visited Apr. 1, 2017).

16. For example, the United States District Court for the Southern District of New York has twenty-eight authorized judgeships. See *Chronological History of Authorized Judgeships—District Courts*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts>. The website lists forty-four judges and does not distinguish between senior and active judges. See generally Frederic Block, *Senior Status: An “Active” Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533 (2007).

17. NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS 7 (2015), http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC_CSP_2015.ashx.

18. *Id.* at 7.

tion. Of the remaining 2.9 million traffic cases filed in courts of general jurisdiction, some were also filed in lower courts. So, we know there are 51.1 million traffic cases, but they are handled in two different types of courts and there is much variation even among the families of courts.¹⁹

Similarly, there were 19.5 million incoming criminal cases in the state courts in 2013, exclusive of criminal traffic matters. Of those, 2.4 million were in the single-tier states. Of the remaining 17.1 million, 13.6 million were in courts of limited jurisdiction and 3.5 million were in courts of general jurisdiction.²⁰ Here too, the most common form of the dual tier system has all cases starting in a lower criminal court and felony cases being transferred, upon indictment, to the trial court of general jurisdiction. But, once again, there is fair variation, and many misdemeanors are heard in higher courts across the country, sometimes as a matter of practice, and sometimes when they are resolved along with more serious charges.²¹

The three other categories of cases, the 16.9 million civil cases, the 5.2 million domestic relations cases and the 1.4 million juvenile cases, are similarly parsed in the study. Each area reflects its own structure and history, even in the most basic descriptive statistics about caseloads. The gross count of the cases offers one perspective on the vastness of the American justice system. Scratching the surface reveals complexity and variation. We can say a bit about the largest trends, but the data is limited and subject to many qualifications.

The system is also dynamic. The report notes a decline in case filings across all types of cases in recent years. Overall filings rose from 2004 to 2008. The 2013 data shows a decline of six percent from the 2004 total of 100 million cases, the earliest data reported in the study, and eleven percent from the highest number of cases filed, the 2008 total of 106 million. Case filings are down thirteen percent since 2004, as measured by filings per 100,000 people. Indeed, as the national population has increased, case filings have declined in absolute numbers as well as relative to population.²²

This overall decline in case filings reflects a few probable trends, but is not well-understood. The significant decline in filings in criminal cases fits with the long-term decline in crime and the decrease in

19. *Id.*

20. *Id.*

21. *Id.* at 8.

22. *Id.* at 2–3.

criminal cases, particularly misdemeanor cases, in some large cities.²³ The decline in juvenile cases appears quite large and reflects declines across all case types.²⁴ The decline in civil cases, which seem to have peaked around, or soon after, the economic downturn in 2008 may be related to the surge in foreclosures and consumer debt actions that grew out of the financial crisis. But the roles of mandatory arbitration clauses,²⁵ and shifts in public perceptions of the courts²⁶ may also be factors.

As one studies the civil docket in American courts, the maps become more obscure and less reliable. Yet this is the most popular part of the landscape for most Americans; the place they would go to resolve contract, property, tort, discrimination, and small claims cases. In 2013, there were about 17 million civil cases filed, excluding domestic relations cases. Analyzing the national picture, the 2013 report of the NCSC, *THE LANDSCAPE OF CIVIL LITIGATION*, notes that “[d]ifferences among states . . . make it extremely difficult to provide national estimates of civil caseloads with sufficient granularity to answer the most pressing questions of state court policymakers.”²⁷ That report studied 152 courts in ten urban counties selected to capture the variety of organizational structures across state courts. The sample consisted of more than 925,000 cases or about five percent of the state civil caseloads.

This report was the first large-scale study of civil cases since the 1992 Civil Justice Survey.²⁸ The report notes the significant increase in contract cases over the past twenty-five years and the modest amounts of money at stake in many of those cases.²⁹ Most of those are consumer debt cases in which banks or other lenders, or their successors in interest, seek judgments against individuals.

23. See OLIVER ROEDER, ET AL., BRENNAN CTR. FOR JUSTICE, *WHAT CAUSED THE CRIME DECLINE* (2015) (analyzing research on the causes of declining crime rates); FRANK ZIMRING, *THE CITY THAT BECAME SAFE* (2011) (analyzing data on crime in New York City and arguing that the data reflects a real increase in public safety).

24. See generally JULIE FURDELLA & CHARLES PUZZANCHERA, *DELINQUENCY CASES IN JUVENILE COURT* (2013), <https://www.ojjdp.gov/pubs/248899.pdf>.

25. See generally Paul F. Kirgis et al., “*Whimsy Little Contracts*” with *Unexpected Consequences: An Empirical Analysis of Arbitration Agreements*, 75 MD. L. REV. 1 (2015) (discussing the rise and prevalence of arbitration agreements as background to empirical work suggesting consumers typically misunderstand arbitration clauses).

26. See Greene, *supra* note 12.

27. PAULA HANNAFORD-AGOR ET AL., NAT’L CTR. ON STATE COURTS, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* iii (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

28. *Id.* at 14.

29. *Id.* at 35.

The rise in consumer debt cases has been accompanied by a steep rise in *pro se* litigants. The NCSC report notes that the 1992 study found very low rates of unrepresented parties in civil litigation in America. In courts of general jurisdiction, where the higher value and higher stakes cases are heard, about five percent of the parties were unrepresented in the 1992 study. The 2013 data shows that plaintiffs continue to be represented in more than ninety percent of the cases, while defendants were only represented in twenty-six percent of the civil cases heard in courts of general jurisdiction.

In small claims courts, on the other hand, the report found “a higher than expected proportion”³⁰ of cases in which the plaintiff was represented by counsel. While both sides were represented in only thirteen percent of the small claims cases, as is consistent with the design of those courts as informal tribunals to resolve minor disputes, more than seventy-five percent of plaintiffs were represented by counsel.

The report notes that to the degree the public, or the legal profession, thinks of the core of civil litigation as high stakes tort, contract, and property litigation between parties represented by counsel, that is a serious misunderstanding. While there is tremendous variation from county to county and court to court, most civil litigation involves low stakes contract cases³¹ in which at least one party is *pro se*.³²

American civil litigation has changed in the last twenty-five years from a system in which both parties either had or did not have a lawyer to a system in which civil plaintiffs usually have lawyers and civil defendants usually do not. While overall rates of self-representation have risen in this group of cases, the rise in unrepresented defendants facing a represented plaintiff in a civil action emerges as among the most distinctive³³ and concerning trend.³⁴ The expansion of consumer

30. *Id.* at 33.

31. *Id.* at 17.

32. *Id.* at 32.

33. Of course some courts have long had high rates of *pro se* litigants. Landlord tenant courts in many large cities have long had many cases in which unrepresented tenants faced landlords represented by counsel.

34. *Pro se* defendants are less likely to resolve their cases at an earlier stage with summary judgment or other pretrial motions and represented parties get better outcomes. See HANNAFORD-AGOR ET AL., *supra* note 27, at 33; Sandefur, *supra* note 1, at 69 (marshalling evidence that represented parties prevail at higher rates than *pro se* litigants); see also JOHN M. GREACEN, SELF-REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 8–12 (2003), http://lri.archive.lsc.gov/sites/lsc.gov/files/LRI/pdf/02/020045_selfrep_litigants_what_weknow.pdf.

credit, the growth of debt buying,³⁵ the greater openness of courts to *pro se* litigants, the rise in the cost of legal services, and the reinvigoration of the American culture of self-help are all likely causal factors, but this important phenomenon is not well-understood.

The American justice system is vast, complex, varied, and dynamic. The scope and dynamism reflect the size and vitality of our nation. The complexity reflected in federalism and specialization reflects our ambitions and sophistication. The variations across the system are not just a result of these forces—they are the most basic expression of the Anglo-American commitment to dispersing power in overlapping institutions and valuing local independence as a counterweight to the centralizing tendency of legal hierarchies. As the great comparativist Mirjan Damaska noted, the common law is fundamentally committed to complexity and variation as important means, in and of themselves, to achieve fairness in individual cases and resist tyranny.³⁶

The vastness, complexity, variation, and dynamism of our courts reflect basic social facts like population and economic trends as well as structural features reflecting deep normative commitments to dispersed power, local control, and broad access to courts. Complexity and variation are not accidental or transient features of our justice system. Of course, that does not mean we must celebrate complexity and variation for their own sake. Those characteristics pose great challenges to the movement to improve access to justice in America. Foregrounding their deep roots of this complexity and variation helps bring the nature of the difficulties into sharper focus and points toward helpful interventions.

It is hard to change a very large, complex, varied, and dynamic system. Fortunately, many actors in the justice system share the goals of improving access to justice. But getting all of them, or even many of them, to agree on a shared vision of what improved access would look like is a difficult endeavor. Moving from that broad agreement to

35. See generally FED. TRADE COMM'N, *THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY* (2013), <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf>; RACHEL TERP & LAUREN BOWNE, *PAST DUE: WHY DEBT COLLECTION PRACTICES AND THE DEBT BUYING INDUSTRY NEED REFORM NOW* (2011), https://consumersunion.org/pdf/Past_Due_Report_2011.pdf.

36. Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 *YALE L.J.* 480, 509 (1975) (arguing that competing views of the structure of authority are the fount of the continental emphasis on hierarchy, uniformity, and formal proof as compared to the Anglo-American toleration for dispersed and competing power, variation in result, and the performative emphasis of adjudication by time limited trial).

efficacious reform presents other challenges. There are a few levers attached to all parts of the system, but the reach of general, top-down solutions is quite limited.

The United States Supreme Court sits atop the entire, sprawling justice system and its decisions can have important effects throughout the whole system. Cases such as *Goldberg v Kelly*³⁷ and *Turner v Rogers*³⁸ can reframe, or decline to reframe, the legal context for the kinds of civil litigation most often encountered by low- and moderate-income Americans. But the Court hears about seventy cases a year, and the impact of its decisions turns out to be very hard to predict over time. To analogize from the criminal context, *Gideon v Wainwright*³⁹ was a milestone in strengthening the Sixth Amendment right to counsel in criminal cases but it surely did not solve the problem.⁴⁰

Congress, subject to the complex doctrines of federalism, has the power to make national laws and fund local programs. There are significant political and fiscal constraints on the use of those powers to address access to justice issues in the state courts.

Both the Supreme Court and Congress have the capacity to communicate directly with the entire justice system. The Supreme Court, when it addresses the meaning of the United States Constitution, speaks directly to all judges and other legal actors. When Congress passes national laws, in particular, national laws disbursing federal funds to legal institutions and setting conditions for those expenditures, it speaks directly to the whole system. The volume and efficacy of those communications is significantly constrained by law and politics, but information flows from those national institutions to all parts of the system and the two bodies exercise direct authority over the whole system.

Direct lines of communication and authority also characterize the relationships between state governments and their state courts and within the hierarchy of each state court system. Here again, state high courts are limited by the uncertain reach of new court rulings and state legislatures face fiscal and political constraints on efforts to reform or improve courts. But statutory reform, advancing case law, budgeting,

37. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that due process requires fundamental fairness in a hearing to terminate government benefits).

38. *Turner v. Rogers*, 564 U.S. 431 (2011) (requiring safeguards in civil contempt proceedings but failing to find a right to counsel in those proceedings).

39. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the Sixth Amendment right to counsel in criminal cases into the Fourteenth Amendment and requiring the states to provide counsel to indigent defendants in criminal cases).

40. See generally Erwin Chemerinsky, *Lessons from Gideon*, 122 *YALE L.J.* 2676 (2013); GIDEON at 50, <http://gideonat50.org/> (last visited Apr. 18, 2017).

and policy are ways that information can flow from state level leaders to other actors in the courts, subject to political and financial constraints, which can often be considerable.

Information does not flow so easily between state systems or horizontally among the many dispersed actors in a given state system. A judge may get legal guidance from the appellate court under which she sits but there are not usually direct channels by which a judge can get guidance about new procedures or practices being used in other courts, particularly those in other jurisdictions. Similarly, court personnel, who play such a key role in the experience citizens have when they seek justice in the courts, do not enjoy the benefits of judicial review and often have limited access to information about what is going on in other courtrooms, other courthouses, and other court systems. Our justice system is organized to foster compartmentalization.⁴¹

Yet, across all the components of this vast, complex, varied, and dynamic system, most of the judges, clerks, litigants, and others share some basic desire for justice. They would not usually discuss it, occupied as they are with the daily business and often jockeying to get things done and move along. But they are all working for justice, sometimes in collaboration, and sometimes in conflict. If they could be a little more coordinated, the system would work better. Can we help them get more on the same page?

II.

CHANGING VAST, COMPLEX, VARIED, AND DYNAMIC SYSTEMS

Economists and game theorists, notably Thomas Schelling⁴² and Robert Myerson,⁴³ have modeled and analyzed complex, dynamic systems in which multiple actors try to communicate about and coordinate their activities without direct communication. These works highlight the role of norms, social understandings, and culture, all of which give rise to shared, tacit understandings which Schelling cate-

41. The lack of horizontal communication among the states systems and the limits on vertical communication within each jurisdiction persist, despite the leaps in information sharing technologies and practices of the last two decades. Transparency is greater in many dimensions as courts' websites and other channels have flourished but the volume and fragmentation of contemporary information flows in among the actors in the vast civil justice system make organizing principles and structural issues as, if not more, crucial today than they were twenty years ago.

42. *See supra* note 8.

43. Roger B. Myerson, *Learning from Schelling's Strategy of Conflict*, 47 J. ECON. LITERATURE 1109 (2009) (discussing how Schelling's focal point analysis illuminates questions of design and reform of political and social institutions).

gorized as *focal points*,⁴⁴ and which have also come to be known as *Schelling points*. Although the analogy is not on all fours,⁴⁵ there is something to learn from viewing judges, court personnel, litigants, politicians, and other stakeholders in their roles as participants in a single very large, very complicated social institution. Schelling's framework accords with the general observation that all the participants in the justice system are engaged in a common and interrelated enterprise. Most of the actors share the desire to increase access to justice, at a high level of abstraction at least, and the nature of the work requires them to coordinate their activities to some degree. But communication across many different kinds of units and roles in this big system is quite limited. In game theoretic terms, access to justice is, in part, a coordination game in which direct communication among players is limited.

Judges, court staff, litigants, and others are constrained by legal, budgetary, and social realities, as they strive to achieve justice. Those constraints impose the rules of the game. As with many challenging games, multiple strategies or approaches or frameworks can be applied. The game is much more like chess than tic-tac-toe, as it presents great complexity of play and a multiplicity of strategies.

The actors in this system choose among alternative paths that balance those constraints in different ways. Each available path—perhaps one spends more resources on providing counsel in more cases while another directs those resources to improving access for unrepresented litigants—is one of the available combinations of resources, procedures, and so on. Each one of those paths is one of the *multiple equilibria* available in that system.

In other words, all the actors in the justice system share the goal of giving all Americans access to justice within the law and with the resources available. They operate in a single large system that has many smaller operating units and act in ways that reflect their understanding of the equilibria of the unit or units in which they participate. Viewing the problem in this light, a key issue is how change occurs in systems such as these.

44. See generally SCHELLING, *supra* note 8. The notion of coordination problems grew out of the game theoretic debate that developed around questions of modeling conflict, particularly international conflict in the early Cold War. See generally WILLIAM POUNDSTONE, *PRISONER'S DILEMMA* (1992).

45. SCHELLING, *supra* note 8. Actors in the justice system may not understand themselves as participants in the larger national game, which could cause many to ignore focal points outside their particular court or jurisdiction. This paper does not explore whether this is a pure coordination situation or a mixed-motive situation. The analogy is by no means perfect, but it still has force.

Game theorists before Schelling recognized that in some systems, there is an equilibria or strategy that minimizes downside risk for all players.⁴⁶ The prisoners' dilemma is the best-known example. In that dilemma, two prisoners are in custody. Each could inform on the other or remain silent. If only one informs on the other, the single informant gets released and the other prisoner gets ten years. If both inform, they both get seven years. If both stay silent, each gets a three-year sentence. If one prisoner could be sure he or she could inform on the other without consequences, informing would benefit the informer to the detriment of the other. But given that the two prisoners cannot communicate or learn of the other's conduct before acting, both are best served by keeping their mouths shut and accepting moderate punishment. That game has a single equilibrium that minimizes harm to all and gives maximum gains to none: the mini-max outcome.

Schelling extended the game theoretic constructs to situations presenting multiple equilibria, as well as complicated his analysis by noting three categories of incentive structures: pure conflict, mixed motives, and pure coordination.⁴⁷ Building on the insights of the Cold War game theorists, economists, and computer scientists, Schelling foregrounded the roles of tacit understanding, indirect communication, competition, cooperation, threat, and the psychology of bargaining in the real world of conflict.

How do multiple actors or players coordinate their moves if they cannot or will not talk to each other? Schelling theorized that *focal points*—choices that seem natural or intuitive—are key to coordinating many multi-actor interactions in the absence of direct communication. The standard example of a focal point imagines the problem of meeting someone at a specified time in New York City without having agreed on a place. Assume that each of the two people accepts that he

46. John Nash developed the idea of non-cooperative equilibrium point for multi-layer games. Also known as a "mini-max" solution or a "Nash equilibrium," these are strategies that do not lead to victory but rather minimize the player's loss and the adversary's advantage. See David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331, 363–64 (2001). In tic-tac-toe, a player who gives up the opportunity to win can be assured of not losing. Another example is the idea that the best way to split a piece of cake is to have one person cut the cake and the other person choose between the two slices. Schelling notably extended game theory from the formal assumption of a single mini-max points to the many complex systems that offer not just one Nash equilibrium, but a number of equilibria. Although some economists decry the lack of determinism, Myerson argues that this is the space for culture and contingencies to affect the choice among multiple equilibria. Myerson, *supra* note 8, at 5.

47. See generally SCHELLING, *supra* note 8, at 81–118 (discussing the reorientation of game theory to account for interdependent decision making in situations involving multiple equilibria).

or she must travel somewhere in New York City and cannot simply wait for the other to come to him or her; both accept the wisdom of a mini-max or equilibrium.

Under these conditions, many would say that the *Schelling point* or *focal point* for the meeting is the information booth in the main hall of Grand Central Terminal—that is, for many, the intuitive place for two people to meet in New York City. Of course, Times Square also comes to mind, as might Union Square, particularly if the two people were lifelong trade unionists or knew that each harbored deep nostalgia for Klein's Department Store. The point is that the solution reflects a shared understanding of how to choose among the many equilibria and that shared understanding does not reflect a winning or even optimal strategy, as measured by most notions of efficiency or utility. After all, there are multiple reasonable places to meet and the solution does not minimize travel time or costs. Rather, it reflects the unspoken but shared understanding of what is natural or expected among the multiple actors.⁴⁸

Imagine a judge who encounters a consumer credit (contract) case involving an unrepresented defendant who does not speak English. In the absence of rules directing a solution, should the judge simply adjourn the case, try to secure counsel for the defendant, try to get an interpreter, or negotiate a settlement between the parties? Each choice would bring the case to a different equilibrium and each is plausible. The judge will use a *focal point*, or *Schelling point* to choose among these equally suitable paths.

Choices like these play out across the justice system every day. In each courtroom and clerk's office, litigants, clerks, judges, and others act in conformity with their understanding of what others think is acceptable in the justice system. Very few of those actors want to be unjust or want to foster practices that deny or limit access, although they do face very real constraints and pressures. But too few have ready access to reliable, valid data that would usefully predict which solution is optimal in each case, nor do they learn often enough about norms and accepted best practices in other jurisdictions, courts, and offices. In short, many would benefit from more reliable, well-vetted focal points to inform their daily work. While reform at this level cannot ameliorate inadequate resources, or do much to address substantive legal issues, it can make a real difference in access to justice on the ground.

48. *See id.* at 90–97 (discussing traditions and culture as focal points and describing the intellectual process of discerning focal points in coordination games as one of imagination and empathy).

III.

IMPROVING *SHELLING POINTS* FOR ACCESS TO JUSTICE

Judges, clerks, litigants, and others are constantly using unspoken, shared assumptions about the justice system. Some reform strategies make explicit, clarify, and sort among the competing focal points that are constitutive of our shared understanding of access to justice in America. A key example of this work is the Justice Index created by the National Center on Access to Justice at Fordham Law School.⁴⁹ The Justice Index is an online resource that scores and ranks the fifty states, District of Columbia, and Puerto Rico on their adoption of selected best practices for ensuring access to justice.⁵⁰ The Index is intended to create incentives by publicizing comparative data.

The Justice Index is a notable example of the growth of indexes, lists, and assessments of all kinds of systems, services, and markets. Heather Gerken's book, *THE DEMOCRACY INDEX*,⁵¹ is a well-developed application of the indexing idea to the American election system. In her book, Professor Gerken collects and analyzes data to rank the states' voting systems. Recognizing that indexing is not a panacea, the book has a useful discussion of the limits, as well as the benefits of indexing. This ranking of voting systems is a very sophisticated, nuanced example of the larger contemporary phenomenon of lists and rankings of all sorts of products, services, and institutions.

Highlighting the work of coordinating strategies need not diminish the importance of reform to substantive and procedural law of budgetary support for access to justice by legislatures⁵² and courts.⁵³ Given the scope and complexity of the justice system, there is ample

49. JUST. INDEX, <http://justiceindex.org/> (last visited July 7, 2017).

50. *Id.*

51. Heather Gerken, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009).

52. For information on Texas's efforts, see TEX. ACCESS TO JUST. COMM'N, <http://www.texasatj.org/state> (last visited Apr. 18, 2017), which describes legislation raising the cap on civil fines that may be directed to legal aid funding. *See also* Press Release, Cal. Senator Bob Wieckowski, *Wieckowski Applauds Increased Legal Aid Funding to Provide Low-Income Californians Access to Courts* (June 10, 2016), <http://sd10.senate.ca.gov/news/2016-06-10-wieckowski-applauds-increased-legal-aid-funding-provide-low-income-californians> (describing a California legislative effort to increase access to justice).

53. For an example of significant change within a system of direct communication and influence, see PERMANENT COMM'N ON ACCESS TO JUSTICE, *REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK* (2016), http://www.nycourts.gov/access-to-justice-commission/PDF/2016_Access_to_Justice-Report.pdf. Florida offers another example of court initiated action. *See* Administrative Order No. AOSC16-71 of the Supreme Court of Florida (Oct. 10, 2016), <http://www.flaccessstojustice.org/read-the-administrative-order/>.

space for several different kinds of strategies for improvement. Where leadership is committed, and makes access to justice a signal issue, much can be accomplished. New York is a prime example of how much can be accomplished by dynamic and skillful judicial leadership. But, not every system is ripe for top-down change, and, even when it is, coordinating these large systems remains a challenge. Room for local reform remains. In those cases, where political or other factors make leaders less oriented toward reform, coordination remains a viable strategy.

The Justice Index is usefully understood as a coordinating mechanism, although that is not the only frame in which its virtues may be explored. It measures access to justice in four dimensions—access to counsel, assistance for unrepresented people, support for people with limited English proficiency, and support for people with disabilities.⁵⁴ The Index does not claim these four categories are exhaustive of access to justice or even analytically necessary to access; the project is much more pragmatic. It has identified consensus features of access that are reasonably subject to assessment, both because the goals are well specified and data on each feature is available or readily gathered.

For example, in ranking jurisdictions on the degree of help they offer *pro se* litigants, the Index measures whether the state has a court employee dedicated to creating initiatives to help those litigants, court staff are trained on working with *pro se* litigants, electronic filing systems are accessible to *pro se* litigants, and more than twenty other factors.⁵⁵ Its measures of language and disability access are similarly practical and relatively modest in scope. The Index does not aim for systemic, all-encompassing change; its primary audience is not comprised of Supreme Court judges and governors. Although high-level leaders are often attentive to overall rankings that get public attention, those who work at lower levels in a given hierarchy have incentives to attend to the details and mechanics of the particular components and subparts that inform overall scores.⁵⁶

54. *Composite Index: Overall Scores and Rankings*, JUST. INDEX, <http://justiceindex.org/2016-findings/findings/> (last visited July 7, 2017).

55. *Self-Representation Access: Support for Self-Represented Litigants*, JUST. INDEX, <http://justiceindex.org/2016-findings/self-represented-litigants/> (last visited July 7, 2017).

56. University and hospital presidents, law and business school deans, and all kinds of business CEOs must attend to the top-line U.S. News and other rankings. But their many subordinates must know, follow, and directly respond to the nitty-gritty of ranking systems. Rankings matter in business, education, the professions, and the public

In addition to identifying key moments, creating metrics to measure them, and then ranking outcomes, the Justice Index also links those outcomes to replicable policies and practices. In other words, a judge, clerk, or other actor can learn what works and how to improve access to justice in their daily work. The Index aims to be of practical use when actors find themselves at *Schelling points*. Think of a mid-level manager in the Clerk's Office of a court of general jurisdiction in a mid-sized city. She is tasked with preparing an annual training program.

We can usefully conceptualize the different combinations of subjects that mid-level manager might choose to cover in the training as multiple equilibria. In other words, there are many different reasonable combinations of topics a knowledgeable trainer might include, each of which is an adequate solution to the problem of what should be covered in a training for clerks, judges, and other in the civil justice system. The Justice Index helps to create a focal point that advances access to justice by training court staff to view "helping people without lawyers,"⁵⁷ as a natural and intuitive part of their job. The Justice Index also provides useful, vetted resources for conducting trainings that will optimize outcomes.

Emerging problems and approaches, such as court-sponsored assistance and unbundled legal services for self-represented people, present particularly useful contexts for efforts to develop focal points. After all, new problems and approaches are least likely to have settled or widely-shared *Schelling points*. For example, the Index has several metrics relating to limited scope or unbundled representation.⁵⁸ While unbundling of legal services is not a brand new idea, it is recent enough that most judges, court personnel, and lawyers do not have well-formed or fixed ideas about providing these kinds of legal services. While change is often challenging to legal professionals, respectful as they tend to be of precedent, new forms of practice offer promising spaces for focal points.

sector, even as the mechanisms and magnitude of impact varies significantly with context.

57. JUST. INDEX, *supra* note 55.

58. *Id.* Unbundled services, also known as limited-scope representation, are legal services, including legal advice from a lawyer, aimed at a single problem and in the context of a single encounter, rather than an ongoing attorney-client relationship. *See generally* Forrest S. Mosten, *Unbundling Legal Services Today*, 35 FAMILY ADVOCATE 14 (2012) (describing unbundled services). For an insightful analysis of the need for procedural reform to realize the promise of unbundling and other promising changes, see Jessica Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 774 (2015).

For some lawyers, resistance to unbundled services reflects their perception that the attorney-client relationship is naturally an ongoing one. Of course there is nothing “natural” about the highly formalized relationship between lawyer and client, but the power of a focal point is, to small degree, its intuitive appeal. Focal points are what everyone believes everyone else knows. As a lawyer, if I believe everyone else thinks the attorney-client relationship must be ongoing and all-encompassing, I will be reluctant to tell other lawyers or judges, that the relationship could or should be much more limited. I don’t want to be wrong. But, if I know others question that received wisdom, it would change my behavior.

While a few questions in the Justice Index won’t change professional attitudes by themselves, the Index and other efforts to make unbundled services a part of the everyday conversation about improving access to justice are a worthwhile part of the effort to coordinate the many dispersed actors in this complex system. The aim is to move the attitudes and choices of multiple actors, each of whom has discretion and autonomy. That autonomy both limits the degree to which sweeping change can be imposed from above and opens a space for change, even in the absence of leaders committed to reform.

For all its promise, indexing and ranking institutions is no panacea. In many sectors, particularly education, the impact of rankings is disputed and there is much criticism. But even in that sector, many schools trumpet strong results, even though their faculties may decry the underlying methods.⁵⁹ In the marketplace, standard setting and rankings are everyday tools; Schelling was an economist before he was a game theorist. Credit and commerce rely upon an understanding of shared standards in the absence of direct communication. But still, not everything that can be counted, should be counted and not everything that should be counted, can be counted.

The danger of managing to the index or ranking, rather than the context, remains. A canny administrator can confer the title “Director of Access to Justice” on an employee so that his or her unit can check the box on a survey but give that person no resources or authority. It is a problem that incentives can often be gamed, and that it is challeng-

59. The U.S. News rankings of universities have shifted some important focal points for school leaders in ways that many see as detrimental. Emphasis on standardized test scores of entering students as a measure of institutional strength has created incentives to award financial aid in ways that many see as promoting privilege and decreasing opportunity. *See generally* DIANE RAVITCH, *THE LIFE AND DEATH OF THE GREAT AMERICAN SCHOOL SYSTEM* (2010) (discussing the negative impact of the rise of assessment and benchmarking in primary and secondary education).

ing to calibrate the incentives to each setting. These are issues that must be addressed, but they are not a fundamental critique of data driven indexes.

Another set of problems inherent in data-driven rankings is that they must rely on things that can be measured. Sophisticated systems can find many useful data points and proxies for intangibles that resist counting and ordering. No index yet created, however, can measure a court's progress toward perfect justice. The norm is too contested and, in our current understanding, too much a matter of context and specifics. But again, the risk that we will only attend to what we count must inform our efforts, but it is not a reason to give up counting.

A third set of concerns revolves around the now general understanding that *Schelling points*, as shared (or believed to be shared) social understandings, by their nature, encode bias and stereotypes. *Schelling points* are powerful because they permit coordination in the absence of direct communication. But they are second best to direct communication. The message they convey is incomplete and relies upon the judgment, discretion, and receptivity of each actor. The use that each actor makes of a focal point is, in the end, informed by the understanding of that actor. Focal points cannot make us good, but they can help us to be good, if we are so inclined.

CONCLUSION

The justice system in America is vast, varied, complex, and dynamic. It is the sum of the work and activities of a multitude of actors in many different courts, tribunals, and agencies. Opportunities for top-down, systemic reform across the whole system are extremely limited. And even where a court or official is vested with binding authority over lower courts or government officials, barriers to effective top-down reform remain. For example, information does not flow easily even where there are clear lines of authority and horizontal exchange of information among similarly situated courts in different states, is very limited and almost entirely informal.

In a system with that structure—great complexity, multiple equilibria, and limited information flow—focal points are a key mechanism by which actors coordinate their behavior. Judges, clerks, litigants, and policy makers struggle with the challenges of increasing numbers of unrepresented litigants, non-English speaking litigants, physically-challenged litigants, and the constant struggle of resource constraints. In that struggle, information about what works for others and how good ideas can be replicated is of tremendous value.

American courts were not designed for efficiency, uniformity, or centralized control. Local control and individual discretion, is often constrained, but not closely dictated by law. These are deeply embedded features our system, dedicated as it is to checking power by dividing it. There is much to be gained by coordinating the work of all those local actors and efforts like the Justice Index are important, useful, and potentially powerful ways to get all those people pulling in the same direction.