

COURTING ACCESS TO JUSTICE: THE RULE OF LAW, THE RULE OF THE ELITE, AND NON-ELITE NON- ENGAGEMENT WITH THE LEGAL SYSTEM

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¹ The terms “elite” and “non-elite” are discussed in detail in Section I(A). In short, the “elite” are the wealthy and political elite who have the resources to access and benefit from society’s civil justice system. The “non-elite” are those who do not have the resources to meaningfully access society’s civil justice system.

A. ARE COURTS—AS A TOOL OF THE ELITE—CURRENTLY
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Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in sometime later on. "It is possible," says the gatekeeper, "but not now." The gate to the law stands open, as always, and the gatekeeper walks to the side, so the man bends over in order to see through the gate into the inside. When the gatekeeper notices that, he laughs and says: "If it tempts you so much, try going inside in spite of my prohibition. But take note. I am powerful. And I am only the lowliest gatekeeper. But from room to room stand gatekeepers, each more powerful than the last. I cannot endure even one glimpse of the third." The man from the country has not expected such difficulties: the law should always be accessible for everyone, he thinks, but as he now looks more closely at the gatekeeper in his fur coat, at his large pointed nose and his long, thin, black Tartar's beard, he decides that it would be better to wait until he gets permission to go inside. The gatekeeper gives him a stool and allows him to sit down at the side in front of the gate. There he sits for days and years. He makes many attempts to be let in, and he wears the gatekeeper out with his requests. The gatekeeper often interrogates him briefly, questioning him about his homeland and many other things, but they are indifferent questions, the kind great men put, and at the end he always tells him once more that he cannot let him inside yet. The man, who has equipped himself with many things for his journey, spends everything, no matter how valuable, to win over the gatekeeper. The latter takes it all but, as he does so, says, "I am taking this only so that you do not think you have failed to do anything." During the many years the man observes the gatekeeper almost continuously. He forgets the other gatekeepers, and this first one seems to him the only obstacle for entry into the law. He curses the unlucky circumstance, in the first years thoughtlessly and out loud; later, as he grows old, he only mumbles to himself. He becomes childish and, since in the long years studying the gatekeeper he has also come to know the fleas in his fur collar, he even asks the fleas to help him persuade the gatekeeper. Finally his eyesight grows weak, and he does not know whether things are really darker around him or whether his eyes are merely deceiving him. But he recognizes now in the darkness an illumination which breaks

inextinguishably out of the gateway to the law. Now he no longer has much time to live. Before his death he gathers up in his head all his experiences of the entire time into one question which he has not yet put to the gatekeeper. He waves to him, since he can no longer lift up his stiffening body. The gatekeeper has to bend way down to him, for the difference between them has changed considerably to the disadvantage of the man. "What do you want to know now?" asks the gatekeeper. "You are insatiable." "Everyone strives after the law," says the man, "so how is it that in these many years no one except me has requested entry?" The gatekeeper sees that the man is already dying and, in order to reach his diminishing sense of hearing, he shouts at him, "Here no one else can gain entry, since this entrance was assigned only to you. I'm going now to close it."

FRANZ KAFKA
BEFORE THE LAW

I. THE CHALLENGE OF ACCESS

Access to affordable legal services is critical in a society
that depends on the rule of law.
A.B.A.

Much ink has been spilled on the topic of the rule of law and access to justice in the United States² and beyond.³ For many, like the man from the country in Kafka's parable,⁴ access to justice is elusive.⁵ There is robust literature on the subject describing rule of law systems, the barriers to entry, and ways to make courts more accessible.⁶ Recent studies show that many

² See, e.g., A.B.A., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 8 (2016) [hereinafter A.B.A., 2016 LEGAL SERVICES REPORT], https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNF_WEB.pdf; TEX. COMM'N TO EXPAND LEGAL SERV., REPORT OF THE TEXAS COMMISSION TO EXPAND LEGAL SERVICES 1–3 (2016) [hereinafter 2016 TEXAS LEGAL SERVICES REPORT], <http://www.courts.state.tx.us/media/1436563/complete-cecls-report.pdf>.

³ See, e.g., JUAN CARLOS BOTERO & ALEJANDRO PONCE, WORLD JUSTICE PROJECT, MEASURING THE RULE OF LAW (World Justice Project, WPS No. 001, 2011), <https://ssrn.com/abstract=1966257>; COMMUNITY PARALEGALS AND THE PURSUIT OF JUSTICE (Vivek Maru & Varun Gauri eds., 2018).

⁴ FRANZ KAFKA, BEFORE THE LAW (Ian Johnston trans., 2015), <http://johnstoi.web.viu.ca/kafka/beforethelaw.htm>.

⁵ See A.B.A., 2016 LEGAL SERVICES REPORT, *supra* note 2, at 5; Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 452 (2016).

⁶ See, e.g., A.B.A., 2016 LEGAL SERVICES REPORT, *supra* note 2, at 11; 2016 TEXAS LEGAL SERVICES REPORT, *supra* note 2, at 2. See generally COMMUNITY PARALEGALS AND THE PURSUIT OF JUSTICE, *supra* note 3.

need access,⁷ yet other studies show that only a small percentage of the people pursue access.⁸ Thus, there is reason to believe that the vast majority of people with justiciable issues do not seek access to the courts. Unanswered is the question of why they do not seek access to the courts even if their interests are adversely affected. It could be that there are barriers to entry, a judicial legitimacy issue, or that they simply do not see the value of seeking a solution from the courts.

A. WHO ARE THE ELITE AND NON-ELITE?

The gatekeeper in Kafka's parable stops the man from the country and denies him permission to access "the law." While the gatekeeper's role never becomes clear, he is surely part of an elite group to which the man from the country does not belong. Of the elite group, he is only one of many, and each one of his kind encountered within the gates is more powerful than the last. Even though the man from the country believes that "the law should always be accessible for everyone," he is advised not to enter without the gatekeeper's permission.⁹

A member of an "elite" group can refer to a person associated with any political, economic, social, or other group who is a key player in the system or has advantages as a result of education, economic resources, or political capital. This Article uses the word "elite" to refer to the wealthy and political elite. These two groups are its focus because they either operate within or control the political framework to which all are held accountable.

The political elite are those who *operate* the government within society (including, of course, the lawyers who effectively operate and control the governmental court system). Even if the political elite are not wealthy, they understand the rules and procedures controlling the system's operation. This differs from someone who simply works for the government. The wealthy, while not necessarily operators within the government, have the resources to purchase, influence, or access the system.

For this discussion, a member of the non-elite group refers to anyone who does not have the resources to influence or effectively access the court system. While the non-elite may lack the money to access the court system, that is not the only governing factor. It could also be that the non-elite member is not sophisticated enough to fully utilize the court system, even if he or she has the financial resources to do so. And someone working within the government could be part of the non-elite. If a person does not

⁷ See, e.g., A.B.A., 2016 LEGAL SERVICES REPORT, *supra* note 2, at 12–13.

⁸ See Sandefur, *supra* note 5, at 443–44.

⁹ KAFKA, *supra* note 4.

hold a high position of government such that he or she can see the political landscape on which the elite operate, that person will likely face the same challenges as non-elites who are not part of the government.¹⁰

B. FOR WHAT ISSUES DO THE NON-ELITE NEED THE INTERVENTION OF THE COURTS?

Utilization of the court system to address “everyday problems” eludes a significant portion of the American population.¹¹ According to the 2016 World Justice Project Rule of Law Index, the United States ranks 18th out of 113 countries for rule of law issues.¹² The score of each country is primarily based upon the ordinary citizen’s ability to access the state system by examining “experiences and perceptions of citizens and professionals concerning the performance of the state and its agents and the actual operation of the legal framework in their country.”¹³ The United States falls behind most Western countries (such as Denmark, Norway, Finland, the United Kingdom, etc.).¹⁴ Worse still, the United States ranks 28th out of 113 countries in access to civil justice issues.¹⁵ This likewise places the United States behind most Western countries, the Republic of Korea, Hong Kong, Uruguay, Czech Republic, Grenada, Antigua and Barbuda, Barbados, United Arab Emirates, and Portugal, to name a few.¹⁶ The details of the issues many Americans face explain these rankings.

Similarly, among the significant findings of the American Bar Association (“A.B.A.”)’s 2016 *Report on the Future of Legal Services in the United States* (“A.B.A. 2016 Legal Services Report”) was the grim

¹⁰ See Martin Shapiro, *Courts: A Comparative and Political Analysis*, 1 IND. J. GLOB. LEGAL STUD. 37, 47–48 (1986).

¹¹ See Sandefur, *supra* note 5, at 447–48.

¹² WORLD JUSTICE PROJECT, RULE OF LAW INDEX 21 (2016), https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf. “The rule of law provides the foundation for communities of peace, opportunity, and equity—underpinning development, accountable government, and respect for fundamental rights.” *Id.* at 8. Access to the civil justice system, or access to justice, is only one of many factors considered by the rule of law. *Id.* at 10–12. See *infra* Section II(A) for a more detailed discussion of the rule of law.

¹³ *Id.* at 152 (describing WJP’s RULE OF LAW INDEX methodology).

¹⁴ *Id.* at 21.

¹⁵ *Id.* at 41. Access-to-justice issues contemplate “whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system.” *Id.* at 12. See *infra* Section II(D) for a more detailed discussion of access to justice.

¹⁶ *Id.*

reality that many Americans face little access to civil legal services.¹⁷ The inability—whether perceived or real—of Americans to access civil legal services leads to situations where they “are forced to either represent themselves or avoid accessing the legal system altogether.”¹⁸ Moreover, many who do seek access to the system frequently seek the assistance of overburdened and underfunded low-income or pro bono legal service providers.¹⁹ With overwhelming need and insufficient staff to assist, these providers must turn away those who would otherwise qualify for assistance.²⁰ This situation—citizens of one of the wealthiest countries in the world being turned away for assistance from a lawyer—is particularly troubling given that the U.S. legal system is routinely considered the model for budding democracies and a frequent comparison standard for other countries’ legal systems.

Yet these generic statements do not adequately describe the reality that many Americans face. A significant finding of the *A.B.A. 2016 Legal Services Report* was that around one hundred million low- and middle-income Americans lack the assistance of an attorney when confronting issues considered “basic human needs.”²¹ These “basic human needs” include sustenance, shelter, employment, safety, health care, and child- or dependent-adult custody issues.²² These “basic human needs . . . emerge ‘at the intersection of civil law [in the justice system] and everyday adversity.’”²³ These issues are encountered by all Americans at different points in their lives, and they all have a “central important quality: they are justiciable.”²⁴ The key is that all of these issues “have civil legal aspects, raise civil legal issues, have consequences shaped by civil law, and may become objects of formal legal action.”²⁵

Moreover, out of the one hundred million Americans noted above

¹⁷ Although there is still great need for discussion of criminal access-to-justice issue, this article is focused solely on civil legal needs. Unlike the criminal justice system, where Americans facing significant criminal charges will be appointed a lawyer to represent them, there is no such provision for civil legal issues. *Cf. Gideon v. Wainwright*, 372 U.S. 335 (1963). As a result, many facing civil legal issues must attempt to navigate the complex civil legal system without the assistance of a lawyer.

¹⁸ A.B.A., 2016 LEGAL SERVICES REPORT, *supra* note 2, at 8.

¹⁹ *Id.*

²⁰ *See, e.g., Access to Justice Facts*, TEX. ACCESS TO JUST. FOUND., <http://www.teajf.org/news/statistics.aspx> (last visited Nov. 11, 2020).

²¹ A.B.A., 2016 LEGAL SERVICES REPORT, *supra* note 2, at 12.

²² *Id.*; Sandefur, *supra* note 5, at 443.

²³ Sandefur, *supra* note 5, at 444.

²⁴ *Id.* at 443.

²⁵ *Id.* (citing HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 12 (1999) (defining “justiciable event”).

facing civil legal issues, it is “estimated [that] thirty to forty million litigants” do engage the civil justice system,²⁶ resulting in over 19 million state trial court civil cases each year.²⁷ Extrapolating this to a local level, nearly 5.8 million people in Texas alone qualify for legal aid.²⁸ Yet for the reasons noted above, only approximately one hundred thousand Texans actually receive assistance by a legal aid organization after applying for services.²⁹ Thus, it is not surprising that at least one party is proceeding pro se in up to 90 percent of civil cases.³⁰ Unfortunately, the grim picture painted by these statistics and issues are not the result of recent events or circumstances affecting our legal system. Instead, they are consistent (and perhaps even represent an intensifying problem), as illustrated by the results of previous A.B.A. reports.³¹

Few of the studies look at *why* Americans do not turn to the courts. However, the A.B.A.’s 1994 *Legal Needs and Civil Justice: A Survey of Americans* (“A.B.A. 1994 Comprehensive Legal Needs Study”) does provide some insights.³² The low- and moderate-income Americans in this survey faced many of the typical access-to-justice problems noted above.³³ The study asked participants how they dealt with the situation.³⁴

²⁶ Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 749 (2015).

²⁷ *Id.* at 743.

²⁸ *Access to Justice Facts*, *supra* note 20. “To qualify for free civil legal services in Texas, an individual must not earn more than \$14,850 per year. A family of four must not earn more than \$30,375 per year.” *Id.*

²⁹ *Id.*

³⁰ Steinberg, *supra* note 26, at 743.

³¹ For more information, visit the A.B.A.’s access-to-justice research and evaluation website: https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj_commission_self-assessment_materials1/studies.html.

³² A.B.A., LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994) [hereinafter A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY], https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.authcheckdam.pdf; see A.B.A., 2016 LEGAL SERVICES REPORT, *supra* note 2, at 12 (citing A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32).

³³ See Sandefur, *supra* note 5, at 450; A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32, at 11.

³⁴ A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32, at 17 fig..

<i>Way of dealing with situation</i>	<i>Low income</i>	<i>Moderate income</i>
Handled by own initiative	41%	42%
Took no action at all	38	26
Turned to civil justice system	29	39
Consulted non-legal third party	<u>13</u>	<u>22</u>
	121%	129%

A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32, at 17 fig.³⁵

As can be seen, the most common answer for both low- and moderate-income Americans was to handle the situation on their own. For low-income Americans, the second most common answer was to do nothing. Only 29 percent of low-income Americans turned to the civil justice system—lawyers, mediators, arbitrators, or courts—to resolve the issue. By contrast, moderate-income Americans' second most common answer (39 percent) was to turn to the civil justice system.

For low-income Americans, the issues most likely to be resolved by the civil justice system were family and personal/economic injury.³⁶ Low-income Americans handled housing and property matters predominantly on their own outside the system.³⁷ The other issues (finances/consumer, employment-related, health-related, and community/regional) were primarily dealt with by taking no action.³⁸

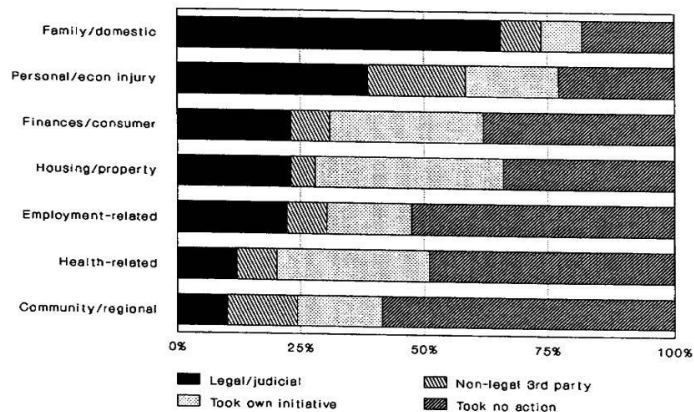
³⁵ "Note the columns add to more than 100 percent since more than one action was sometimes taken." *Id.* at 19.

³⁶ *Id.* at 19 fig.4.

³⁷ *Id.*

³⁸ *Id.*

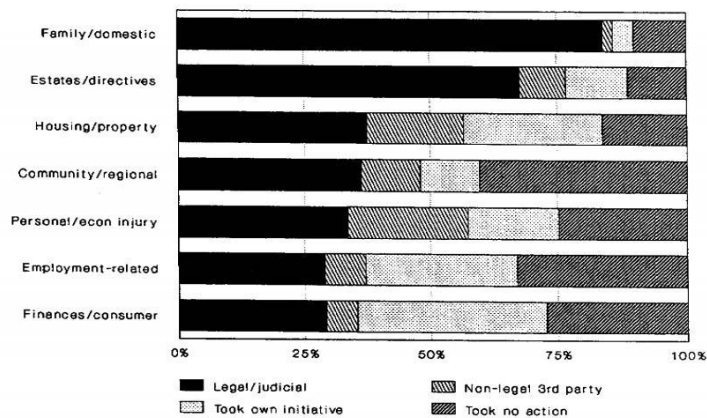
**4: MOST "FORMAL" ACTION BY TYPE OF NEED
Based on Low-Income Legal Needs**



A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32, at 19 fig.4.

For moderate-income Americans, the percentages of those seeking civil justice system resolution were about the same for family/domestic issues but much higher for all other areas.³⁹

**5: MOST "FORMAL" ACTION BY TYPE OF NEED
Based on Moderate-Income Legal Needs**

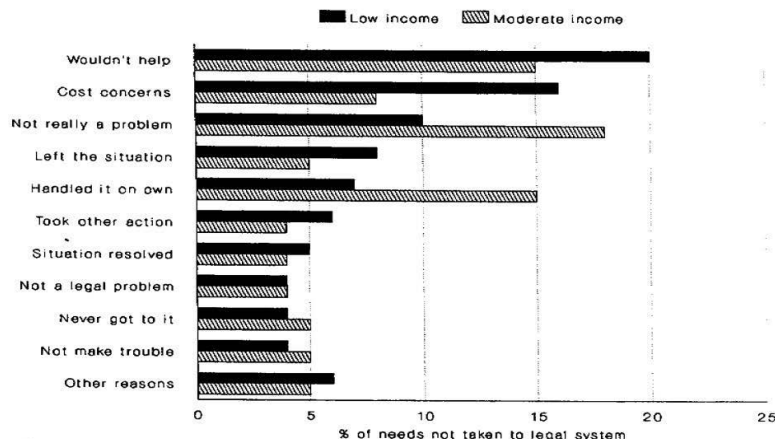


A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32, at 19 fig.5.

³⁹ *Id.*

While these findings have legal implications that are obvious to lawyers, they may not be as obvious to non-lawyers.⁴⁰ As evidenced by the charts above, issues that are commonly considered “legal” had the highest involvement with the civil justice system.⁴¹ “Thinking of a justice problem as ‘legal’ plays a large role in whether or not people consider lawyers as a solution.”⁴² People are “more than twice as likely to at least consider using lawyers for situations they understood as ‘legal’ than for those situations that they did not.”⁴³ Perhaps most interesting are the reasons people gave for not doing anything when facing a civil justice issue.

7: MAIN REASON FOR NOT TURNING TO CIVIL JUSTICE SYSTEM WHEN HAVING A LEGAL NEED



A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32, at 21 fig.7.

Despite knowing they faced an issue that could be resolved by the civil justice system, people chose to do nothing for a variety of reasons—that it would cost too much, that it was “not really a problem,” or that they could “handle it on their own.”⁴⁴ However, the primary reason respondents did not seek access to the civil justice system was because they did not believe it

⁴⁰ See Sandefur, *supra* note 5, at 449.

⁴¹ *Id.*

⁴² *Id.* (citing Pascoe Pleasence et al., *What Really Drives Advice Seeking Behaviour? Looking Beyond the Subject of Legal Disputes*, ONATI SOCIO-LEGAL SERIES (2011)).

⁴³ *Id.*

⁴⁴ A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32, at 21 fig.7.

would help.⁴⁵ This is consistent with the notion that low-income and moderate-income Americans, as non-elites in America, do not believe that the system works for them and their problems.⁴⁶

Rebecca L. Sandefur's work sheds some light on the decisionmaking process of Americans facing a justiciable civil legal issue. Her study found that a little over a fifth (22 percent) of participants seek help outside of their immediate social network when faced with a civil justice issue.⁴⁷ More concerning was her finding that even fewer engaged the legal system despite knowing that they had a problem: only 8 percent would contact a lawyer and only 8 percent would involve a court.⁴⁸ Instead, the most common response to a civil justice issue—by far—was to try to deal with the problem on their own or “do nothing.”⁴⁹

The *A.B.A. 1994 Comprehensive Legal Needs Study* raised two questions that are similar to those raised in this discussion:

- Why are people not receiving legal help when they may benefit from it? (Is it because they are unaware of their legal rights or worry about the cost of representation? Are they resigned to some adversity? Do they face administrative obstacles or some kind of barrier? Do they want to avoid strife? Or, are they unaware of the legal help that may be available?)
- Are there certain kinds of problems that can be resolved adequately without the help of a lawyer or other part of the system of justice?⁵⁰

As noted by the *Study*, the “[a]nswers to both questions will have immense implications for the functioning and responsiveness of the civil justice system.” However, those studying the American access-to-justice problem are primarily lawyers and legal scholars—who are also part of the elite in the United States. It is thus unsurprising that most efforts have focused upon access to justice by attempting to ease access to the system through which the elite resolve their disputes.

⁴⁵ *Id.* This is consistent with the findings of Sandefur in her 2013 Middle City study. See REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 5 (2014), <http://ssrn.com/abstract=2478040>.

⁴⁶ See generally J.D. VANCE, HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS (Harper 2016).

⁴⁷ Sandefur, *supra* note 5, at 448 (citing SANDEFUR, *supra* note 45, at 5).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32, at 18.

Further, the concept that the court is part of an elite group within a system not set up to accommodate or understand the non-elite is not fundamentally different than questioning the legitimacy of the judiciary acting as an agent of a regime.⁵¹ However, it may be dissimilar in the way that judges are perceived to make law. The literature on courts functioning as agents of a regime tends to categorize the judiciary from an institutional perspective. In this model, the court is generally implementing the will of the regime on all within the court's jurisdiction. Non-elite litigants may see the judiciary as acting in an attitudinal way that is biased in favor of the elite regardless of law or equity.

While these issues regarding access to justice affect the rule of law, they also have serious implications for the sustained legitimacy of the rule of law. In an otherwise stable and legitimate rule of law system, if the non-elite group becomes the majority, it could be destabilizing to the overall system. Thus, the non-elites' perception of the courts must be a factor in the on-going conversation about access to justice and the rule of law.

This Article explores these topics, discusses whether Americans are seeking access to the courts, and addresses how the legal profession and courts can encourage people to seek access to the civil justice system to redress problems. Section II focuses upon the rule of law and access to justice, what they are intended to achieve, and what they imply. Section III turns to the legitimacy of the courts in resolving disputes for the non-elite and the methods employed in other jurisdictions that have increased the legitimacy of courts.

II. THE RULE OF LAW

Access to justice is a basic principle of the rule of law.
UNITED NATIONS AND THE RULE OF LAW

The rule of law is the political ideal often credited with “promoting justice, improving economic development, building democracy, and increasing international cooperation” (when it is applied equally).⁵² But it is unclear how the rule of law truly operates. Is society governed by the rule of law? Or is society merely governed by the elite who make and shape the law to protect their interests? If it is the latter, could this explain why non-elites do not turn to the legal system to protect their rights or adjudicate their

⁵¹ See Karen Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT'L RELS. 33, 35 (2014).

⁵² Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law*, 42 LAW & SOC. INQUIRY 1, 100 (2017).

civil disputes?⁵³

A. CONCEPT AND DEFINITION OF THE RULE OF LAW

The concept of the rule of law is ancient⁵⁴ and well known, but a precise definition is difficult to articulate.⁵⁵ Common theories of the rule of law identify the private rights of citizens and define the imposition of “limits on the exercise of power by [the] government.”⁵⁶ The limits on power typically impose “meaningful restraints on the state and individual members of the ruling elite.”⁵⁷ The concept of a ruling elite is contemplated in the United Nations definition, which defines the rule of law as “a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”⁵⁸ The World Justice Project, alternatively, defines the rule of law as:

a rules-based system in which the following four universal principles are upheld: (1) the government and its officials and agents are accountable under the law; (2) the laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property; (3) the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and (4) access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the [demographics] of the

⁵³ While this last question is specifically part of the access-to-justice issue within the rule of law framework, it is discussed in this Article in the context of the broader rule of law and legitimacy of the overall system.

⁵⁴ The Hammurabi Code, enacted by the Babylonian King Hammurabi nearly four thousand years ago includes many of the “elements of modern notions of the rule of law.” BOTERO & PONCE, *supra* note 3, at 4.

⁵⁵ *See id.* (mentioning that Oxford professor A.V. Dicey is generally credited with coining the phrase in the nineteenth century).

⁵⁶ *Id.* at 5 (citing BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004)).

⁵⁷ *Id.* (citing RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002)).

⁵⁸ U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 6, U.N. DOC. S/2004/616 (Aug. 23, 2004) [hereinafter U.N. Secretary-General, *The Rule of Law and Transitional Justice*].

communities they serve.⁵⁹

Both of these definitions identify safeguards that protect non-elite groups from the tyranny of the ruling elite. First, both definitions state that *all* are accountable under the law. Second, both include human rights protections and require fairness in the laws. These can apply to individuals seeking to protect their rights from the government, or it can apply to the balance of powers within the government. Rebuilding and developing countries attempt to incorporate the core concepts of these definitions when implementing a rule of law society similar to those found in western Europe and America.⁶⁰

B. THE RULE OF LAW IS INEXTRICABLY INTERTWINED WITH INDEPENDENT JUDICIAL REVIEW

The American constitutional experiment with the rule of law “has appeared to be singularly innovative and successful and thus serves as a world model.”⁶¹ Two specific features of our American system, the Bill of Rights and independent judicial review, have been consistently incorporated in rebuilding and developing countries seeking a rule of law system.⁶² In an ideal system, independent judicial review seems to be key for a prosperous rule of law country.

Independent judicial review “lies at the convergence of two streams of limitations on government.”⁶³ The first limitation is “the division of government powers, the famous American ‘checks and balances.’”⁶⁴ The second limitation is “constitutional guarantees of individual rights.”⁶⁵ Further, the core of judicial review and the rule of law “involves the ability and willingness of the courts to decide cases in light of the law without undue regard to the views of other government actors.”⁶⁶ Although the judiciary does not have the proverbial purse or sword, when the other

⁵⁹ BOTERO & PONCE, *supra* note 3, at 5 (noting that this definition was “originally articulated by William H. Neukom in 2007, and it has since been vetted with thousands of individuals in over one hundred countries”).

⁶⁰ See U.N. Dev. Programme [UNDP], *Strengthening the Rule of Law in Crisis-Affected and Fragile Situations: Global Programme Annual Report 2014*, 5 (2014) [hereinafter UNDP, *Strengthening the Rule of Law*].

⁶¹ Martin Shapiro, *The Globalization of Law*, 1 *IND. J. GLOB. LEGAL STUD.* 37, 48 (1993).

⁶² *Id.* at 48–49.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 49.

⁶⁶ James Melton & Tom Ginsburg, *Does De Jure Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, *J. L. CTS.* 187, 190 (2014).

branches of government abide by and enforce the rulings of the judiciary, the rule of law is generally in place and effective.⁶⁷

The World Justice Project uses a variety of basic concepts and factors to evaluate the rule of law, most of which relate to the functioning of the court system in a given country.⁶⁸ Typically, the stronger the independence of the judiciary, the better the country will score on the index.⁶⁹ Further, the preference for expanding judicial power seems to progress over time.⁷⁰ This is done ostensibly by governments as they seek to create “more independence, more rights protection, more rule of law, more democracy, or all of these combined.”⁷¹ These efforts are believed to legitimize the government, enable peaceful resolution of conflicts, and promote economic growth.⁷² Thus, the role of judges and the rule of law should expand globally as time goes on.

C. ARE JUDGES THE ELITE?

A court’s “reputation for neutrality is crucial to the social legitimacy” of the rule of law.⁷³ Courts, by definition, are part of the governmental structure. The “[s]eparation of powers doctrines notwithstanding, the

⁶⁷ *Id.* at 191.

⁶⁸ BOTERO & PONCE, *supra* note 3, at 9. The World Justice Project uses a variety of basic concepts and factors to evaluate the rule of law. The first of nine factors is “limited government powers,” which “measures the extent to which those who govern are subject to law.” Stated differently, whether a ruler or ruling elite is/are “subject to legal restraints.” *Id.* The second factor, “absence of corruption,” contemplates the “use of public power for private gain.” *Id.* at 10. The third factor, “order and security,” “measures how well the society assures the security of persons and property.” *Id.* The fourth factor, “fundamental rights,” analyzes the “system of positive laws” that protect human rights. *Id.* at 11. The fifth factor, “open government[,] allows for a broader level of access, participation, and collaboration between the government and its citizens, and plays a crucial role in the promotion of accountability.” *Id.* at 12. The sixth factor is “effective regulatory enforcement,” which “measures the fairness and effectiveness in enforcing government regulations.” *Id.* at 13. The seventh factor, “access to civil justice,” measures whether ordinary people can resolve their grievances through formal institutions of justice in a peaceful and effective manner, as well as in accordance with generally accepted social norms rather than resorting to violence or self-help.” *Id.* at 14. The eighth factor measures whether the system has an “effective criminal justice system[] . . . capable of investigating and adjudicating criminal offenses effectively and impartially, while ensuring the rights of suspects” and protecting victims. *Id.* at 15. The final factor, “informal justice,” refers to the ways that countries resolve disputes in “traditional, tribal, and religious courts as well as community-based systems.” *Id.*

⁶⁹ WORLD JUSTICE PROJECT, RULE OF LAW INDEX, *supra* note 12.

⁷⁰ See, e.g., Daniel M. Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15 INT’L J. CONST. L. 296, 304 (2017).

⁷¹ *Id.* at 297.

⁷² See UNDP, *Strengthening the Rule of Law*, *supra* note 60, at 5.

⁷³ Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMP. POL. STUD. 147, 155 (1999).

lawmaker and the judge are not easily detached from one another.”⁷⁴ Further, while the “independence” of the judge can be debated based on the ex-ante or ex-post control over a judge by a government,⁷⁵ the judge will always be part of the governmental structure. Thus, the status of becoming a judge, through education and position within society, will necessarily make that person part of the “elite” in a society.⁷⁶

As part of the structure of government, one historical⁷⁷ role of courts has been exercising social control over conquered people.⁷⁸ In this role, courts, in addition to other methods and institutions, are used by the ruling elite to “maintain or increase their legitimacy.”⁷⁹ The courts can be used to resolve conflicts among the people or between the people and the elite.⁸⁰ Peaceful resolution of conflict is administered by courts using norms or laws to which all are accountable. While achieving the goals addressed above, it can also ensure the status quo by ruling in favor of the elite.

Additionally, not all laws are created equal. “[W]hen the courts are [elite] allies, the specific content of . . . justice is dictated by the preferences of the [elite].”⁸¹ The courts, if so closely tied to the elite “that they endorse and promote those preferences[,]” become, “not spaces for contesting visions of constitutional justice, but tools to impose and legitimize the particular vision defined by whoever is in power.”⁸² Rather than implementing laws that are created through public representation and “consistent with international human rights norms and standards,”⁸³ the “law” may be designed to preserve the ideals of the ruling elite, which is then imposed over the non-elite subject to their jurisdiction.⁸⁴ In adjudicating disputes and issues, courts necessarily issue rulings, which

⁷⁴ *Id.* at 161.

⁷⁵ See DANIEL M. BRINKS & ABBY BLASS, *CONCEIVING COURTS: THE POLITICAL ORIGINS OF CONSTITUTIONAL JUSTICE IN LATIN AMERICA* 34–39 (2015) (preliminary draft on file with author).

⁷⁶ See JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA*, 34–35 (2007). This is true in both civil and common law societies, but even more so in common law societies. *Id.*

⁷⁷ See SHAPIRO, *supra* note 10, at 19 (noting that although this model was used by “imperial judicial systems such as Rome, China, and the black empires of central Africa,” it was also used by common law systems such as the Normans).

⁷⁸ *Id.* at 22.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ BRINKS & BLASS, *supra* note 75, at 58.

⁸² *Id.*

⁸³ See U.N. Secretary-General, *The Rule of Law and Transitional Justice*, *supra* note 58, at 4.

⁸⁴ See, e.g., SHAPIRO, *supra* note 10, at 23.

then become law.⁸⁵ How the non-elite perceive these laws is critical. If the laws are viewed as favoring the elite at the expense of the non-elite, that perception engenders distrust of the law and the system. It is in this context that non-elites may question access to the courts—access to justice—as a viable method to resolve their issues.

D. ACCESS TO THE COURTS?

The World Justice Project measures access to justice by determining “whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system.”⁸⁶ Access to justice includes a consideration of whether the process is “in accordance with generally accepted social norms, rather than resorting to violence or self-help.”⁸⁷ This also has been described as “access to dispute resolution mechanisms, mostly in terms of access to counsel and access to tribunals.”⁸⁸ Further, access to justice “requires that the system be accessible, affordable, effective, impartial, and culturally competent.”⁸⁹ In measuring the access to justice for the rule of law index, the following factors are considered:

[G]eneral awareness of available remedies . . . ; availability and affordability of legal advice and representation . . . ; and absence of excessive or unreasonable fees, procedural hurdles, linguistic barriers, physical location of courthouses, and other impediments to access to formal dispute resolution systems Impartiality includes absence of arbitrary or irrational distinctions based on social or economic status and other forms of bias . . . , as well as decisions that are free of improper influence by public officials or private interests Access to justice also implies that court proceedings are conducted and judgments enforced without unreasonable delay Access to justice also requires fair and effective enforcement Finally, [the last] sub-factor . . . considers the accessibility, impartiality, and efficiency of alternative dispute resolution mechanisms—namely, mediators and arbitrators.⁹⁰

⁸⁵ *Id.* at 28.

⁸⁶ WORLD JUSTICE PROJECT, RULE OF LAW INDEX, *supra* note 12, at 12.

⁸⁷ BOTERO & PONCE, *supra* note 3, at 14.

⁸⁸ *Id.* at 13.

⁸⁹ *Id.*

⁹⁰ *Id.*

The key, it appears, is whether the government must provide “alternative dispute mechanisms to provide effective access to justice; while refraining from binding persons who have not consented to be bound by the mechanism.”⁹¹

These notions are reflected in the American definitions of access to justice. The Texas Access to Justice Commission, for example, defines access to justice as “the ability of any person, regardless of income, to use the legal system to advocate for themselves and their interests.”⁹² As a testament to these beliefs, Lady Justice, Themis, has been depicted blindfolded for over five centuries to show that the law “guarantee[s] equal justice to the rich and poor alike.”⁹³ The notion of equality under the law and using the courts to resolve conflict and establish and protect rights was fundamental to the founding of the United States. The Declaration of Independence is a legal document that declared independence from England after King George III violated the colonists’ legal rights and impeded the “Administration of Justice.”⁹⁴ Many of the events leading up to the Declaration took place in courtrooms.⁹⁵ The Constitution, moreover, is a legal “charter of liberties and limits on power, and the Pledge of Allegiance ends by affirming that [the United States] stands for ‘liberty and justice for all.’”⁹⁶ “Justice, the Guardian of Liberty” is even carved on the Supreme Court of the United States building.⁹⁷

Thus, the consensus in the United States and abroad appears to be that the traditional notion of access to justice requires access to the courts (or other governmental systems) for peaceful conflict resolution of civil disputes with substantively and procedurally fair adjudication.⁹⁸ This concept, like the rule of law, dates back to the beginnings of organized society.⁹⁹ Before organized courts and governmental systems, two parties with a dispute “that they could not themselves solve,” would seek a third

⁹¹ *Id.*

⁹² *What Is Access to Justice*, TEX. ACCESS TO JUST. COMM’N, <http://www.texasatj.org/what-access-justice> (last visited Nov. 11, 2020).

⁹³ See BENJAMIN H. BARTON & STEPHANOS BIBAS, *REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW* 4 (2017).

⁹⁴ *Id.* at 3.

⁹⁵ See, e.g., James M. Farrell, *The Child Independence is Born: James Otis and Writs of Assistance*, in *RHETORIC, INDEPENDENCE AND NATIONHOOD* (Stephen E. Lucas ed.), in *2 A RHETORICAL HISTORY OF THE UNITED STATES: SIGNIFICANT MOMENTS IN AMERICAN PUBLIC DISCOURSE* (Martin J. Medhurst ed., Mich. State Univ. Press forthcoming).

⁹⁶ BARTON & BIBAS, *supra* note 93, at 4.

⁹⁷ *Id.*

⁹⁸ BARTON & BIBAS, *supra* note 93, at 3–4; Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 *LOY. L.A. L. REV.* 979, 995 (2009).

⁹⁹ SHAPIRO, *supra* note 10, at 1.

“for assistance in achieving a resolution.”¹⁰⁰ This situation is frequently referred to as a “triad.”¹⁰¹ The triad is so simple and pervasive that it appears in almost every society.¹⁰² “In short, the triad for purposes of conflict resolution is the basic social logic of courts—a logic so compelling that courts have become a universal political phenomenon.”¹⁰³

However, consent to the process, rules, and the decider is crucial to the effectiveness of the triad.¹⁰⁴

Early Roman law procedures provide a convenient example. The two parties at issue first met to decide under what norm their dispute would be settled. Unless they could agree on a norm, the dispute could not go forward in juridical channels. Having agreed on the norm, they next had to agree on a judge, a third person who would find the facts and apply the previously agreed upon norm to settle their dispute. The eventual loser was placed in the position of having chosen both the law and the judge and thus of having consented to the judgment rather than having had it imposed on him. . . .

All of this can, of course, be put in the form of the classic political question: Why should I obey? The loser is told that he should obey the third man because he has consented in advance to obey. He has chosen the norm of decision. He has chosen the decider. He has thus chosen to obey the decision.¹⁰⁵

This basic model of consent for dispute resolution is evident in our modern society. Today, to simplify matters, societies substitute law in place of having to choose unique dispute resolution strategies for each conflict.¹⁰⁶ In other words, people can exercise their free choice through the election process. Thus, by electing judges to office, people consent to them being the arbiter of disputes within that community.¹⁰⁷ In addition, if people elect the officials that appoint judges, they ostensibly consent to the appointed arbiter. However, this notion of consent alone does not sufficiently guarantee that those subject to the jurisdiction of the court will consider the

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2.

¹⁰⁵ SHAPIRO, *supra* note 10, at 2 (internal citations omitted).

¹⁰⁶ *Id.* at 5.

¹⁰⁷ This presumes, of course, that the people vote.

process fair and the judgment legitimate.

As courts implement the law, especially criminal law, one party will necessarily feel that the government, through the court, has sided against them.¹⁰⁸ For many in the non-elite group, their interactions with the court and legal system will primarily be through compulsory procedures, such as the criminal law process or child custody adjudications. “Police, prosecution, and other agencies executing criminal [or child custody] law may unjustly deprive a person of her freedoms.”¹⁰⁹ The “appointments, promotion, tenure, and salaries [of judges] depend on the government.”¹¹⁰ Those subject to the implications of an adverse ruling may believe that the elite act against the non-elites’ interest in favor of other elites. For example, a tenant in an eviction proceeding will likely view the landlord as part of the same elite group to which the lawyers and the judge also belong. This observation is compounded if the judge rules in favor of one of the elites.¹¹¹ At the moment of the ruling, a “shift occurs from [appealing to a neutral arbiter for a decision] to a structure that is perceived by the loser as two against one.”¹¹²

As a result, the non-elite litigant is likely reluctant to seek the assistance of a court for non-compulsory, civil matters. It would appear that the elite are creating the laws that control all others. The dominant players within the system all seem to be a part of an elite group within society.

¹⁰⁸ See SHAPIRO, *supra* note 10, at 19.

¹⁰⁹ Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1506 (2006).

¹¹⁰ *Id.* “Arguably, only impartial jurors can adequately protect an individual from such abuses.” *Id.* (citing RANDOLF N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 18–24 (2003) and stating that the conventional wisdom that perceives juries as protecting individuals from being abused by the government); John B. Attanasio, *Foreword: Juries Rule*, 54 SMU L. REV. 1681, 1681–82 (2001) (restating the traditional view under which “[t]he jury is one of the key protections of individual rights, shielding the individual against the government [and that] [b]efore government can fine, imprison, or kill a member of the community, that person has a right to a jury trial.”).

¹¹¹ SHAPIRO, *supra* note 10, at 2.

¹¹² *Id.*

E. WHO WILL UPHOLD THE RULE OF LAW FOR THE NON-ELITE?

Rule of law emerges when, following Machiavelli's advice, self-interested rulers willingly restrain themselves and make their behavior predictable in order to obtain a sustained, voluntary cooperation of well-organized groups commanding valuable resources. In exchange for such cooperation, rulers will protect the interests of these groups by legal means. Rule of law can prevail only when the relation of political forces is such that those who are most powerful find that the law is on their side or, to put it conversely, when law is the preferred tool of the powerful.

José María Maravall & Adam Przeworski

DEMOCRACY AND THE RULE OF LAW

The rule of law and the rule of the elite are likely one and the same. The rule of law contemplates that laws are fairly and openly contemplated, enacted, and enforced for the benefit of the majority. Whether or not these notions of fairness and openness are true, these laws are simultaneously contemplated, enacted, and enforced by the elite in society. It should, therefore, not be surprising that the legislative process and resulting laws mostly benefit the elite.¹¹³

Except for hot-button issues, there does not seem to be widespread complaint about the legislative process or the substance of the laws enacted.¹¹⁴ The people ostensibly elected the elite who enact these laws. As

¹¹³ It is true, though, that there are some in the political and wealthy elite who care about the well-being of the non-elite. To that end, the elite enact legislation that is intended to benefit the non-elite. An example is the recent Texas legislation allowing "Transfer on Death Deeds." See *Texas Transfer Toolkit*, TEX. ACCESS TO JUSTICE COMM'N, <https://www.texasatj.org/texas-transfer-toolkit> (last visited Nov. 11, 2020). However, these elite presume that the non-elite want access to their system for resolution of issues. As a result, most solutions are designed to remove barriers to access of the elite system. However, if the non-elite do not want access, do not know about the legislation, or know about it but do not use it, have the well-intentioned elite helped?

¹¹⁴ While controversial bills in Congress are covered extensively in the news and commented upon by Americans on social media or through protests, the vast majority of legislation is passed with little notice by the average American. To illustrate this point, the 115th Congress enacted 442 laws. Drew DeSilver, *A productivity scorecard for the 115th Congress: More laws than before, but not more substance*, PEW RSCH. CTR. (Jan. 25, 2019), <https://www.pewresearch.org/fact-tank/2019/01/25/a-productivity-scorecard-for-115th-congress/>. A few were controversial and debated vigorously, such as those that sought to repeal the Affordable Care Act. See Robert Pear, *Job No. 1 for a New Congress? Undoing Obama's Health Law*, N.Y. TIMES (Dec. 31, 2016), <https://www.nytimes.com/2016/12/31/us/politics/obamacare-congress.html>. Many laws, however, were enacted without widespread scrutiny or discussion in the media or the community. See DeSilver, *supra* note 113. Many were ceremonial in nature, such as renaming buildings or awarding medals. *Id.* Laws with bipartisan support may have been noted by the media or other

long as the non-elite feel their interests are represented and laws are enacted on their behalf, this process does not excessively trouble the non-elite.¹¹⁵ The non-elite, as a result, do not perceive the elite as attempting to protect and promote elite interests and ideals at the expense of other groups for most “everyday” issues.

The role of the judiciary in this system is important, but likely does not change this answer. The judiciary in almost every system is also part of the elite. Moreover, the judiciary usually upholds the laws enacted or enforced by other elite officeholders. When the judiciary does strike down a law or restrict the power of another branch of government, the judiciary is seen as the protector of the rule of law. The key, it seems, is the appearance of independence. The purpose of the rule of law is to protect the non-elite from the tyranny of the ruling elite groups. Ideal rule of law systems are designed to protect the non-elite by instituting an independent judiciary for resolution of conflict. Yet in practice, the elite are likely also deciding cases through the judiciary.

Simply removing barriers to access the courts is unlikely to increase non-elite usage of the courts. If the non-elite perceive courts as merely extensions of an elite-constructed system to which they do not belong, they will not look to it for dispute resolution. It may take more than permission from Kafka’s gatekeeper and the light inside the walls to entice entry.

III. LEGITIMACY OF THE COURTS AND LEGAL AGENCY IS THE KEY TO ENCOURAGING ACCESS TO JUSTICE

For many people around the world, law is an abstraction, if
not also a threat.

COMMUNITY PARALEGALS AND THE PURSUIT OF JUSTICE

If the above is correct, the non-elite may increasingly perceive the courts as part of an elite structure to which they do not belong. As such, the non-elite may not believe that the courts are there to support them. This

groups, but for the most part they did not receive widespread public debate or controversy. *Id.* These laws include “the First Step Act, an overhaul of the federal criminal justice system; a new five-year farm bill; a law intended to address the opioid crisis by, among other things, expanding the availability of addiction treatment; the Music Modernization Act, which rewrote music copyright and royalty rules for the digital age; a sanctions bill targeting Russia, Iran and North Korea; a bill overhauling and extending veterans’ educational benefits; and the first comprehensive NASA authorization bill in more than six years.” *Id.* This dichotomy—the robust discussion around hot-button issues that make up only a handful of bills proposed versus the hundreds passed with little fanfare—illustrates the point that most Americans are not particularly concerned about the process or the substance of the legislation passed.

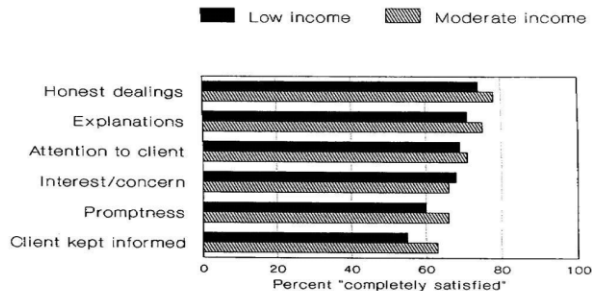
¹¹⁵ See *infra* Section III for a discussion of “consent.”

would explain why a growing number of Americans choose not to bring their issues to courts for resolution. Enhancing the judiciary's legitimacy in the eyes of the non-elite should help restore the belief that the courts are indeed there for them.

A. ARE COURTS—AS A TOOL OF THE ELITE—CURRENTLY RELEVANT?

The *A.B.A. 1994 Comprehensive Legal Needs Study* also considered how satisfied low- and moderate-income Americans were with the civil justice system. Lawyers, as a whole, did fairly well:

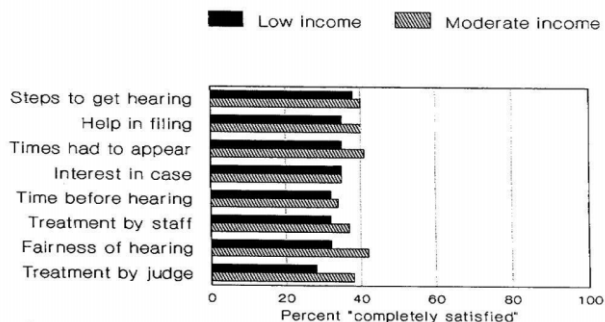
12: RATING OF LAWYER PERFORMANCE Based on Needs Involving a Lawyer



A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32, at 25 fig.12.

Courts, on the other hand, did not:

13: RATING OF HEARING BODY PERFORMANCE Based on Needs Involving a Court/Hearing



A.B.A., 1994 COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 32, at 25 fig.13.

These 1994 findings, which reflect a 30–40 percent satisfaction with courts, are consistent with Sandefur’s study. Of those who interacted with the civil justice system, 47 percent stated that the “experience resulted in a significant negative consequence.”¹¹⁶ While it is expected that 50 percent would be dissatisfied (i.e., they lost), a finding that only 30–40 percent were satisfied is concerning. Thus, it appears that a majority of those who encountered the civil justice system, at best, did not view the system and courts as helpful in resolving disputes.

In 1996, the A.B.A. released its *Final Report on the Implications of the Comprehensive Legal Needs Study* to accompany the *A.B.A. 1994 Comprehensive Legal Needs Study*.¹¹⁷ Based on the findings of the 1994 study noted above, the 1996 final report identified the following as an “Agenda for Access:”¹¹⁸

- (1) Increase the flexibility of the civil justice system, thereby expanding the options available to people seeking help with a legal problem.
- (2) Develop better ways for people to obtain information about their options when facing a legal situation. Ensure that people are able to get referrals to appropriate resources.
- (3) Make the practice of personal services law more attractive within the legal profession.
- (4) Increase pro bono services by the private bar to low-income individuals and households.
- (5) Increase the availability of affordable legal services to less affluent moderate-income individuals and households¹¹⁹

Given that the *A.B.A. 2016 Legal Services Report* makes similar findings and recommendations to the 1994 study, it appears that the issue has not been adequately addressed.

But perhaps legitimacy is the key. Not included in either the A.B.A.’s 1996 or 2016 recommendations is an education plan to emphasize the legitimacy of the courts to resolve disputes in a procedurally and substantively fair manner. As discussed above, fundamental to enhancing

¹¹⁶ Sandefur, *supra* note 45, at 3.

¹¹⁷ A.B.A., *AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 1* (1996), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/agendaforaccess.authcheckdam.pdf.

¹¹⁸ *Id.* at 6.

¹¹⁹ *Id.* at 6–7.

legitimacy is courts demonstrating their authority and autonomy to resolve disputes in favor of the non-elite against the will or wishes of the elite.

B. HOW TO ENHANCE LEGITIMACY

Courts (even the Supreme Court of the United States, the most powerful court in the country) are frequently aligned with the elite in society.¹²⁰ However, evidence of equality under the law, the protection of citizens' rights, and government compliance with rulings are paramount in promoting the legitimacy of courts.¹²¹ Although the courts are not solely responsible for protecting rights, they are principal actors in rights protection.¹²² The courts "are equipped with a broad agenda, open access, and decisive rule-making authority, making them a valuable means to project and extend power while harnessing the relative legitimacy of judges and the rule of law."¹²³ The courts must have the "autonomy to intervene credibly and consistently in rights disputes," with the "authority to resolve the disputes that arise in that area."¹²⁴ Finally, in exercising their autonomy and authority, the court's ruling must also "produce compliance—that is, . . . be recognized as authoritative resolutions of a particular issue."¹²⁵

The United States has one of the hallmarks of legitimacy— independent judicial review. Americans are accustomed to the "power of judges to hold legislation invalid, . . . [and wield] broad interpretative powers even where the applicable statute or administrative action is found to be legally valid."¹²⁶ In addition, these judges are chosen (either by appointment or election) for their expertise, success, and reputation as lawyers.¹²⁷ When combined, these factors are critical to the legitimacy of the courts.¹²⁸

¹²⁰ See generally Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

¹²¹ LISA HILLBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE 17* (Cambridge Univ. Press 2007) ("[T]he rule of law and respect for rights is central to the legitimacy and fairness of a democratic regime.").

¹²² *Id.*

¹²³ BRINKS & BLASS, *supra* note 75, at 62.

¹²⁴ Daniel M. Brinks, "Faithful Servants of the Regime" *The Brazilian Constitutional Court's Role under the 1988 Constitution*, in *COURTS IN LATIN AMERICA*, 128–53 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011).

¹²⁵ *Id.*

¹²⁶ JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 34–35 (4th ed. 2019).

¹²⁷ *Id.*

¹²⁸ Alter, *supra* note 51.

The law works if “those people who have the authority to make, administer, and apply the rules in an official capacity . . . do actually administer the law consistently and in accordance with its tenor.”¹²⁹ Further, “law is the instrument of the sovereign, who, by definition of sovereignty, is not bound by it.”¹³⁰ In the early years of the United States, courts had to seriously consider whether the other branches of government would comply with court rulings.¹³¹ However, today, there is little concern that the government will comply with rulings.¹³² So, why would there be any concern by non-elites about the legitimacy of courts to resolve disputes?

When it comes to civil rights protections,¹³³ American courts often do not provide the strong rights protections that enhance legitimacy. Frequently, unless it is a civil right specifically protected by the Bill of Rights, American courts are not far ahead of the elite in protecting the civil rights of the non-elite.¹³⁴ Moreover, even with the authority and autonomy to do so, American courts are not quick to “find” social and economic rights not specifically included in the Constitution or Bill of Rights.¹³⁵ Declaring

¹²⁹ José María Maravall & Adam Przeworski, *Introduction* to *DEMOCRACY AND THE RULE OF LAW 1* (José María Maravall & Adam Przeworski eds., Cambridge Univ. Press 2003).

¹³⁰ *Id.* at 3.

¹³¹ Clifford James Carruba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems*, 71 *J. POL.* 55, 56 (2009).

¹³² *Id.*

¹³³ This is different than the rights protections of the criminal justice system. This article does not contemplate rights and protections in the criminal justice context.

¹³⁴ See generally Dahl, *supra* note 120.

¹³⁵ In the United States, legal and popular understandings of rights stem from the U.S. Constitution, which is often described as a Constitution of limited, enumerated powers. This means that Congress, the President, and the courts have been granted certain specific powers by the Constitution, and that all other actions are beyond their collective powers. The Bill of Rights, which lays out the shared rights of all individuals in the United States, has been described as granting only negative civil and political rights. These rights are commonly understood to give individuals protections against government invasions of their rights as opposed to requiring that the government provide them with any specific benefits or protections. A prime example of this type of negative right is the right against government seizure of property without due process of law and just compensation.” Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 *CASE W. RES. L. REV.* 997, 1005–06 (2010). “[D]espite strong academic arguments to the contrary, the U.S Constitution continues to be interpreted as a guarantor of negative rights only.” *Id.* at 1007. Moreover, “[s]ocial welfare rights, unlike civil and political rights, are not considered proper subjects for direct constitutional protection in the United States. The Supreme Court has specifically held that there is no constitutional right to welfare benefits, adequate housing, or education.” Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 *UCLA L. REV.* 1195, 1199 (1987) (internal citations omitted). Courts outside the United States have extended social welfare rights requiring protection from the state under the

these rights can take decades of litigation on the issue. For example, it took over fifty years to overrule *Plessy v. Ferguson*¹³⁶ and declare that a “separate, but equal” right to education is unconstitutional.¹³⁷ Even then, the Court arguably did not ensure compliance with its ruling for more than a decade.¹³⁸ Most of the “everyday issues” Americans face are not contemplated by the Constitution or the Bill of Rights.¹³⁹ They are disputes involving creatures of statute and common law—family law, consumer issues, and property law, to name a few. These laws were created by the elite in the legislature or judiciary to govern all. In the creation of the framework that governs all, the process by which the non-elite address their issues is unlikely to be discussed. However, after enactment or ruling, the non-elite are subject to these laws and must resolve their disputes under them, even if it is not how they would like them to be resolved. Further, the courts are unlikely in these situations to substitute their judgment for that of the legislature. As a result, the non-elite’s perception that the system and the laws are not for them (i.e., “would not help”) is understandable.

concept of protecting human dignity. See Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 240 (2011). However,

the U.S. Supreme Court has repeatedly refused to impose such positive duties to protect on dignity or any other grounds. It has held steadfast in this refusal even in the face of egregious neglect by the state to protect the vulnerable: [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without ‘due process of law,’ but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

Id. (citing *DeShaney v. Winnebago Cnty. Dep’t. of Soc. Servs.*, 489 U.S. 189, 195 (1989)); see also *infra* note 137. See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (Harv. U. Press 2001).

¹³⁶ See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding de jure racial segregation).

¹³⁷ See *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). Social and economic rights typically are only gained after decades of litigation on the issue. *Plessy and Brown* provide a convenient illustration, but other examples abound. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481–85 (1965); *Roe v. Wade*, 410 U.S. 113, 152–54 (1973); *Lawrence v. Texas*, 539 U.S. 558, 552–72 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

¹³⁸ See *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 437–40 (1968); *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969).

¹³⁹ See A.B.A., 2016 LEGAL SERVICES REPORT, *supra* note 2, at 14–15.

C. LEGAL AGENCY¹⁴⁰ OF THE NON-ELITE AND LEGITIMACY OF COURTS

Based on the notion that the non-elite have civil justice issues that they want to resolve but cannot afford a lawyer to do so, the primary methods of addressing the access-to-justice gap in the United States have been by removing barriers to accessing legal help, legal aid organizations, and pro bono work by practicing lawyers.¹⁴¹ As discussed above, even with the staggering number of hours volunteered and dollars donated by lawyers, an overwhelming need remains in the United States.¹⁴² Legal aid and pro bono cannot solve the access-to-justice problem. Although developing countries have experimented with “alternative dispute resolution mechanisms and paralegal services,”¹⁴³ these efforts have not been attempted on a wide scale in the United States.¹⁴⁴ Further, there is no reasonable likelihood of a civil *Gideon v. Wainwright* guaranteeing everyone facing a civil justice issue access to a lawyer if they cannot afford one.¹⁴⁵

The challenge of access “is not simply to lower the bar to entry, but to equalize the conditions under which they can shape the landscape and

¹⁴⁰ See Daniel M. Brinks, *Access to What? Legal Agency and Access to Justice for Indigenous People in Latin America*, 55 J. DEV. STUDIES 348, 348 (2016).

¹⁴¹ The Texas Access to Justice Commission works to increase access to justice by: (1) removing structural and cost barriers to the court system; (2) securing funding for legal aid providers so that they have the resources to meet the needs of low-income people seeking representation; (3) increasing pro bono service in the legal community; (4) expanding efforts to assist self-represented litigants. *What Is Access to Justice*, *supra* note 92. Texas lawyers, for example, provide approximately 2.5 million hours in free or indirect legal services annually and privately donate millions of dollars each year. D’ARLENE VER DUIN & PAUL RUGGIERE, STATE BAR TEX., STATE BAR OF TEXAS SURVEY OF 2009 PRO BONO, at i (2010), https://www.texasbar.com/AM/Template.cfm?Section=Research_and_Analysis&Template=/CM/ContentDisplay.cfm&ContentID=11247.

¹⁴² See, e.g., *Access to Justice Facts*, *supra* note 20; A.B.A., 2016 LEGAL SERVICES REPORT, *supra* note 2, at 12.

¹⁴³ Brinks, *supra* note 140, at 348.

¹⁴⁴ Most of these efforts have involved allowing non-lawyers to perform lawyer-like tasks on behalf of clients. For example, the State of Washington created a “Limited License Legal Technician” program to allow non-lawyers to assist clients with limited legal matters. See Lyle Moran, *Washington Supreme Court sunsets limited license program for nonlawyers*, A.B.A. J. (June 8, 2020, 3:35 PM), <https://www.abajournal.com/news/article/washington-supreme-court-decides-to-sunset-pioneering-limited-license-program>. Washington recently ended the program. *Id.* Some other states have considered similar measures or programs, but most have not made widespread changes. See Lyle Moran, *Legal reform advocates need to more actively engage the public*, A.B.A. J. (July 15, 2020, 8:00 AM), <https://www.abajournal.com/legalrebels/article/legal-reform-advocates-need-to-engage-the-public-littlewood-says>.

¹⁴⁵ See BARTON & BIBAS, *supra* note 93, at 70. Since 1963, *Gideon v. Wainwright*, 372 U.S. 335 (1963), has guaranteed that everyone facing a felony charge is entitled to a lawyer if they cannot afford one, resulting in it being possibly one of the most famous and beloved U.S. Supreme Court cases. However, *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981), and *Turner v. Rogers*, 564 U.S. 431 (2011), foreclosed the possibility of a civil *Gideon*.

contest the outcomes, once they have gained entry” to the civil justice system.¹⁴⁶ The system then must be arranged so that the non-elite find that the “institutional, legal, and political arrangement . . . maximizes [their] legal agency.”¹⁴⁷ Legal agency is the “relatively low probability of being denied one’s rights, a relatively high probability of securing redress when those rights are violated, and the capacity to make effective and proactive use of law and legal processes when and as desired in the pursuit of all legally sanctioned life objectives.”¹⁴⁸ Further, legal agency “includes not only the potential of the subject to exercise legal power, but also the notion that they might be held properly accountable for their actions.”¹⁴⁹ Legal agency implies that individuals may have rights taken away by courts but only after they have asserted their full rights in the proceeding.¹⁵⁰ To have more effective legal agency, however, individuals must participate in “crafting the rules that will be applied to them, and in operating the system that will apply those rules.”¹⁵¹ Thus, the legal profession and courts should advance legal agency as a method of encouraging people facing civil justice issues to seek the help of the civil justice system.

South Africa’s Treatment Action Campaign (“TAC”) case is a useful example of legal agency combined with court action. Following apartheid, South Africa faced a major HIV/AIDS epidemic.¹⁵² The TAC was formed to educate the poor about HIV/AIDS and advocated for access to HIV/AIDS drug treatments.¹⁵³ One of its primary goals was to provide drugs that would prevent the spread of the disease from mothers to their children.¹⁵⁴ The South African government, however, was resistant to providing the treatment because the people with HIV/AIDS were viewed as the “despised and deviant ‘others.’”¹⁵⁵ Despite a right to healthcare, the TAC did not immediately go to the courts to enforce this right.¹⁵⁶ Instead the TAC

¹⁴⁶ Brinks, *supra* note 140, at 348–49.

¹⁴⁷ *Id.* at 351.

¹⁴⁸ *Id.* (citing DANIEL M. BRINKS AND SANDRA BOTERO, *INEQUALITY AND THE RULE OF LAW: INEFFECTIVE RIGHTS IN LATIN AMERICAN DEMOCRACIES* (2010)); *REFLECTIONS ON UNEVEN DEMOCRACIES: THE LEGACY OF GUILLERMO O’DONNELL* 214, 218 (Daniel Brinks et al., 2014)).

¹⁴⁹ Brinks, *supra* note 140, at 3.

¹⁵⁰ *Id.* at 3–4.

¹⁵¹ *Id.* at 4.

¹⁵² WILLIAM E. FORBATH, *CULTURAL TRANSFORMATION, DEEP INSTITUTIONAL REFORM, AND ESR PRACTICE: SOUTH AFRICA’S TREATMENT ACTION CAMPAIGN* 51 (Stanford Univ. Press 2011).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 52.

¹⁵⁵ *Id.* at 58.

¹⁵⁶ *Id.* at 60.

focused on the media and society “via public discourse, debate, demonstrations, and protests, keeping in the public eye the results of manifold tests and pilot programs of [the drugs] and the intransigence and resistance-to-reason of government decision makers.”¹⁵⁷

These efforts culminated in early 2002 when the South African Constitutional Court ruled that the government must “provide antiretroviral treatment” to prevent the “mother-to-child transmission of HIV.”¹⁵⁸ The Court found that the treatment was a constitutional right under the country’s right to health care.¹⁵⁹ In addition, the Court ensured compliance with the ruling by ordering that the South African government must bring the program back to court for scrutiny by March 31, 2002.¹⁶⁰

In addition, after the ruling, the TAC aimed to provide education and empowerment about HIV/AIDS through a “Treatment Literacy Campaign” held in churches and clinics throughout the country.¹⁶¹ The TAC successfully undertook the task of helping the people “‘take responsibility’ for their own health, education, or welfare; community housing; or economic development projects.”¹⁶² As a result, the people became more aware of their rights and began to take a more active role in asserting those rights.¹⁶³

Several interesting aspects of the TAC’s success could be implemented in the United States. Unlike NAACP efforts in the United States in the 1960s, the TAC’s litigation was a secondary objective.¹⁶⁴ Instead, the TAC was focused upon a politics-centered approach to social rights advocacy wherein the grassroots movements’ interaction with policymakers ensured that the people’s concerns were being heard and addressed.¹⁶⁵ The appeal to the courts was important, but it was part of a larger plan to achieve a specific goal.¹⁶⁶ When courts did get involved and ruled in favor of the TAC, it legitimized its efforts and legitimized the status of courts in the eyes of the non-elite. Further, the Treatment Literacy Campaign could be a model for “equip[ping] and enabl[ing] the ‘clients’ of social programs [(i.e., the non-elite)] to participate in reforming and reshaping local state institutions and

¹⁵⁷ *Id.*

¹⁵⁸ FORBATH, *supra* note 152, at 62.

¹⁵⁹ *Id.* at 62.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 86.

¹⁶² *Id.* at 89.

¹⁶³ *Id.* at 54.

¹⁶⁴ FORBATH, *supra* note 152, at 89.

¹⁶⁵ *Id.* at 89.

¹⁶⁶ *Id.*

wider systems of social provision.”¹⁶⁷ While South Africa has a long way to go in protecting the civil rights of the non-elite, this case study provides insight into the types of actions that courts can take to empower the non-elite to take interest in, and assert, their civil rights by accessing the courts.

This plan of legal agency coupled with strategic litigation could be effective in the United States for the promotion, awareness, and litigation of rights for the non-elite. First, a key component would be wide-spread education about rights and methods by which the civil justice system can help resolve issues. Second, focused litigation victories assuring rights in court would contribute significantly to the legitimacy of the courts as protectors of the non-elite. As access-to-justice organizations consider next steps, enhancing legal agency must be a top priority.

IV. CONCLUSION

‘[J]ustice’ is less like a fruit that can be picked by whoever manages to get ‘access’ to it, and more like a terrain upon which contested notions of substantive justice get fought out. For individuals who bear the burden of social discrimination and prejudice the problem is not simply a lack of access but inequality within the system itself. As a result, the challenge is not simply to lower the bar to entry, but to equalize the conditions under which they can shape the landscape and contest the outcomes, once they have gained entry.

Daniel M. Brinks

Access to What? Legal Agency and Access to Justice for Indigenous People in Latin America

Kafka’s parable, while thought-provoking to those who are more like the gatekeeper (the elite), the experience of the man from the country (the non-elite) is all too real for many in American society. Many Americans face justiciable issues. Unlike the man from the country, most do not seek access to the courts to resolve those issues. Most scholars and legal professionals assume that people facing a legal issue would want to turn to lawyers and the courts to resolve them but cannot afford lawyers or the court process. While this is likely the case, more research in this area could determine whether this issue stems from lack of awareness of a legal solution to a problem, lack of funding to meaningfully engage in the system, or in a belief that the system was not designed for them as a member of the

¹⁶⁷ *Id.* at 54.

non-elite within society. More must be done to make the civil justice system appealing to the non-elite. There is no point in reducing barriers to a system to which people do not want access.