

Managing Quality of Justice: Global Trends and Best Practices

Nur-Sultan Presentation (open panel format)

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Quality of justice in the United States is maintained as a constitutional matter through the right to due process of law and mechanistically through established systems in place. Managing the quality of justice falls within two general categories: (1) access to justice and (2) the quality of justice accessed. Access to justice encompasses an individual's ability to bring her case to court and obtain a fair resolution; the quality of justice accessed encompasses the process and resources available to that individual once inside the metaphorical courthouse doors.

1. Access to Justice

a. Lack of legal knowledge and high costs prevent some individuals from bringing their cases to court.

i. A 2017 report from the Legal Services Corporation (“LSC”) found that low-income Americans sought professional legal help for only 20 percent of the civil legal problems they faced.

1. Top reasons for why individuals do not seek legal help include not knowing what resources might exist or whether their problem is considered “legal.”¹

ii. The cost of litigation in the United States is very high, which may keep plaintiffs with meritorious but low-value claims out of the courts.

1. Procedural aspects of litigation such as aggressive discovery are a major driver of high litigation costs.

b. The United States has taken steps to try to address limited access to justice.

i. Efficient case management makes justice more affordable – more efficient case management reduces the cost of litigation, thereby increasing access to litigants. Certain mechanisms increase the efficiency of resolution, e.g.:

1. E-filing

2. OSC proposes dispositions for routine cases based on briefs

¹See LSC, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, Executive Summary (2017)
<https://www.lsc.gov/sites/default/files/images/TheJusticeGap-ExecutiveSummary.pdf>.

3. Administrative proceedings for certain areas of law (e.g., labor disputes, immigration) with the right to federal judicial review
- ii. Improving public perception – by creating a transparent judicial system that has set standards and procedures in place, we encourage individuals to perceive the courts as a viable route to resolution; in other words, individuals should feel that they can have their day in court
 1. E.g., litigation procedures defined in the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, etc. that are clearly defined for the litigants and adhered to by the courts
 - iii. Self-help programs – allow individuals to receive legal assistance without formally retaining legal representation.
 1. The American Bar Association website provides a “Legal Help Page,” which lists various directories geared towards specific groups of claimants (e.g., veterans) and areas of law.
 2. Some states provide websites that centralize resources for self-represented litigants in certain areas.
 - a. E.g., in Virginia, the Virginia Judicial System Court Self-Help provides online resources and videos related to divorce law; landlord-tenant law; and custody, visitation, and support law. <https://selfhelp.vacourts.gov/>.
 3. Website self-help services use AI to generate legal documents for users. For example:
 - a. LegalZoom prompts users with questions and generates “form-like” documents in areas like family law (wills, trusts, power of attorney, divorce, property deeds), intellectual property (trademark registration, provisional patent applications), etc. <https://www.legalzoom.com/>.
 - b. LawDepot generates a wide variety of legal forms ranging from wills, eviction notices, LLC operating agreements, and promissory notes. <https://www.lawdepot.com/>.
 - c. HotDocs focuses on transactional legal documents and forms. <https://www.hotdocs.com/>.

4. Prohibitions against the unauthorized practice of law² pose a challenge to some self-help pathways.

2. Quality of Justice

Access to justice is only as meaningful as the quality of that justice. And quality justice requires (1) access to adequate representation and resources, and a judiciary that is (2) independent and (3) informed.

a. Access to representation

- i. **Legal representation is critical; studies have shown that representation greatly increases an individual's chance of a favorable outcome in both civil and criminal cases.** Three areas of civil law exemplify the impact of representation:

1. Immigration

- a. Detained immigrants who are represented at custody hearings are four times more likely to be released from detention than unrepresented immigrants (44 percent with counsel versus 11 percent without).
- b. Detained immigrants with representation were twice as likely as unrepresented immigrants to obtain immigration relief if they sought it (49 percent with counsel versus 23 percent without). Non-detained immigrants with representation were nearly five times more likely than their unrepresented counterparts to obtain relief if they sought it (63 percent with counsel versus 13 percent without).³

2. Employment

- a. According to one study, unrepresented plaintiffs alleging racial discrimination in federal court were nearly half as

²See Rule 5.5 of the Model Rules of Professional Conduct.

³ See Ingrid Eagly & Steven Shafter, *Access to Counsel in Immigration Court*, Am. Immigration Council, 2-3 (2016) https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

likely to win on dispositive pre-trial motions than represented plaintiffs.⁴

- b. Another study looking at mandatory employment arbitrations found that, on average, unrepresented employees received damage awards that were 47 percent lower than those of represented employees.⁵

3. Housing

- a. A study of eviction cases in a Massachusetts district court found that represented tenants were less likely to lose possession (34 percent versus 62 percent of unrepresented individuals) and that represented tenants were less likely to have a judgment entered against them (17 percent of judgments were entered in favor of evictors when tenants are represented, as compared to 75 percent of judgments when tenants were not represented).⁶
- b. Another study of Philadelphia's Housing Court estimated that tenants with legal representation were nineteen times more likely to win than tenants without legal representation.⁷

⁴See *id.* at 919 (citing Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 891 (2006)).

⁵See *id.* at 921 (citing Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. J. WORK & POL'Y 1019, 1031 (2015)).

⁶See Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPPERDINE L. REV. 881, 901-902 (2016) (citing D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 906-07 (2013)).

⁷See *id.* at 904 (citing David L. Eldridge, *The Construction of a Courtroom: The Judicial System and Autopoiesis*, 38 J. APPLIED BEHAV. SCI. 298, 309 (2002)).

ii. **However, individuals do not have a constitutional right to counsel outside of serious criminal cases involving incarceration. And because the cost of litigation and attorneys are so high, many cannot afford representation.**

1. Criminal defendants who are charged with felony crimes and certain misdemeanors have a constitutional right to court-appointed representation.⁸

a. The Sixth Amendment provides that “in all criminal prosecutions the accused shall enjoy the right to . . . have the assistance of counsel for his defense.” U.S. Const. amend. VI.

b. In *Gideon v. Wainwright*, the Supreme Court established that defendants charged with felonies in state criminal courts are guaranteed the right to counsel under the Sixth Amendment.⁹

c. Some, but not all, misdemeanor prosecutions trigger the right to counsel. In *Argersinger v. Hamlin*, the Supreme Court recognized that the right to counsel also applied to some misdemeanor prosecutions--but only those that result in incarceration.¹⁰

2. Unlike in the criminal system where certain criminal prosecutions trigger the right to counsel, there is no guaranteed right to counsel in civil cases. As a result, many civil litigants are unrepresented:

⁸See generally, Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon's Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299 (2017).

⁹*Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”).

¹⁰*Argersinger v. Hamlin*, 407 U.S. 25, 37, 39–40 (1972) (“We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”); see also *Scott v. Illinois*, 440 U.S. 367, 369 (1979).

- a. Only 37 percent of all immigrants and 14 percent of detained immigrants have legal representation in court.¹¹
- b. A 2009 report from the Legal Services Corporation (“LSC”) reported an uptick in unrepresented litigants in civil courts. Although there is no national compilation of statistics, the report looked to state lower court data across a variety of civil matters.¹²
 - i. In New Hampshire, at least one party was pro se in 85 percent of all civil cases in the district court and in 48 percent of all civil cases in the superior court. In superior court domestic relations cases, almost 70 percent of cases had at least one unrepresented party; that number was 97 percent in district court domestic violence cases.
 - ii. In Wisconsin, 70 percent of litigants in family cases were unrepresented.
 - iii. In California, 67 percent of petitioners and 80 percent of respondents in family law cases were unrepresented; over 90 percent of defendants and 34 percent of petitioners in unlawful detainer (eviction) cases were unrepresented
 - iv. In 2016, Georgia state courts heard more than 800,000 cases involving self-represented litigants.¹³

¹¹See Ingrid Eagly & Steven Shafter, *Access to Counsel in Immigration Court*, Am. Immigration Council, 2–3 (2016) https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

¹²See LSC, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, 25–26 (2009) https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

¹³See THE CONVERSATION, *Every Year, Millions Try to Navigate US Courts Without a Lawyer* (Sept. 2017) <http://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159>.

iii. **The United States has sought ways to increase access to counsel and other court resources to ensure quality justice.**

1. Access to legal aid – In 1974, Congress created the LSC to expand access to the civil justice system for low-income Americans by supporting civil legal aid organizations across the country.

a. Individuals qualify for legal aid if their income is less than 125 percent of the federal poverty level. According to the 2018 income guidelines, to qualify for legal aid, an individual must make less than \$15,175 per year, a family of three must make less than \$25,975 per year, and a family of five must make less than \$36,775.

b. In 2017, 60.3 million Americans were eligible for LSC-funded legal assistance.¹⁴

c. However, insufficient resources have not met demand. According to the LSC, in 2017, of the 1.7 million civil legal problems for which low-income Americans seek LSC-funded legal aid, 1–1.2 million (62–72 percent) received inadequate or no legal assistance.

2. Access to other court resources

a. *Interpreters* – 28 U.S.C. § 1827 provides for access to certified interpreters in courts for the hearing impaired or for non-English-speaking parties.

b. *Technology* – e.g., powerpoint slides during testimony; videoconferencing

b. **Judicial Independence**

i. **What Judicial Independence Entails**

1. Judicial independence is the ability and the duty of a judge to decide each case based only on his or her interpretation of the law, without the influence of external pressure from the parties or the government and without individual bias on the part of the judge.

¹⁴See LSC, *By the Numbers: The Data Underlying Legal Aid Programs* (2017) <https://lsc-live.app.box.com/s/z0war4502dbngggwyd8h22ati36c8smr>.

2. It allows every party before a judge--no matter their background--to trust that the law will be fairly applied.
3. Judicial independence is an essential safeguard of the rule of law.
 - a. Case study: President Trump recently called a federal judge an “Obama judge,” stating that “they have a much different point of view than the people who are charged with the safety of our country.” In response, Chief Justice Roberts released a statement to establish the independence of the judiciary asserting that judges are independent. ¹In his statement, Chief Justice Roberts stated: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”

ii. United States Best Practices

1. Compensation and Tenure – Once an individual is appointed to a federal judgeship, our system of judicial compensation and tenure protects judicial independence.
 - a. *Compensation* – The U.S. Constitution does not allow compensation for federal judges to be diminished during their tenure in office.
 - i. This protection ensures that the threat of diminished compensation does not bias judges in favor of the government or any particular party when deciding cases.
 - ii. It also ensures that judges are able to maintain an adequate standard of living in order to diminish the risk that judges will be susceptible to bribes and other forms of corruption.
 - iii. However, the United States faces the dilemma of whether constitutional protections for *judges* are adequate to protect the functioning of the *judiciary*. This issue was particularly salient in the recent shutdown of the U.S. government. Although federal judges are constitutionally guaranteed pay, the judiciary relies on staff who are *not* guaranteed pay; e.g., jurors, the clerk’s office, staff attorneys in OSC, bailiffs.

- b. *Life Tenure* – The U.S. Constitution also states that all federal judges “shall hold their offices during good behaviour.”¹⁵ In other words, the only way to remove a federal judge is through impeachment for a serious offense.
 - i. In the federal system, judicial impeachment is not a tool for removing judges who issue unpopular rulings. Instead, it is a rarely used tool to combat actual misconduct.
 - ii. Removal is a multi-step process that requires action from both houses of Congress.
 - iii. In the United States’s history, Congress has initiated proceedings to remove only fifteen federal judges, of which eight were convicted and removed from office.
- 2. Recusal – Impartiality is a fundamental part of judicial independence. The judge presiding over a case must be free from disabling conflicts of interest. Recusal of the interested judge in such circumstances makes the fairness of the proceedings less likely to be questioned or to be actually compromised.
 - a. A party may seek recusal if the judge before whom the matter is pending “has a personal bias or prejudice either against him or in favor of any adverse party.”¹⁶ Such bias must be evidenced in a source outside the case itself in order to warrant recusal.
 - b. More commonly, judges will recuse themselves on their own motion upon realizing that a conflict of interest exists or could appear to exist.
 - c. Example: In West Virginia, a coal titan was accused of “buying” a W.V. Supreme Court justice. In this case, the CEO of Massey Energy, the fourth-largest coal mining company in the nation, spent \$3 million on advertisements that ultimately helped elect Justice Brent D. Benjamin to the West Virginia Supreme Court. After winning the

¹⁵U.S. Const. art. III § 1.

¹⁶28 U.S.C. § 144.

election, Justice Benjamin declined to recuse himself in a case against Massey and joined the 3-2 majority that threw out a \$50 million jury verdict against the company. The Supreme Court held that his failure to recuse himself violated the Due Process clause of the Fourteenth Amendment.¹⁷

- c. **Judicial Education and Training** – Key to an independent judiciary is neutral and objective education for judges. As our laws grow more complex, so does our need for objective expertise to provide training in technical areas.

i. **United States Best Practices**

1. **Federal Judicial Center Training** – The Federal Judicial Center (the “FJC”) is the research and education agency of the United States judiciary. It offers training for federal judges and staff on both established and emerging areas of law and case management.

a. Baby Judges School – shortly after appointment. Formally called the Orientation Seminar for Newly Appointed Judges, this program, held in two one-week sessions, is held for all incoming district judges each year. New appellate judges are also invited to attend.

b. FJC also sponsors annual workshops and seminars (often hosted at or in conjunction with law schools).

i. Example: webinars on upcoming Supreme Court term

ii. Example: upcoming seminar on climate science for federal judges

2. **University-Sponsored Programs** – Universities and law schools in the United States also offer voluntary education programs for judges. These programs offer training in specialized subjects at a reasonable cost, as the schools already have staff and classroom space in place.

a. Example: George Mason University Judicial Education Program

¹⁷Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

i. Programs are open to federal and state judges and are typically three days long.

ii. Sample upcoming symposium topics:

1. Law & Economics of Consumer Protection

2. Law & Economics of Marijuana Legalization

b. Example: Duke University Annual National Security Law Conference

c. Example: U.C. Berkeley conference on Intellectual Property in the New Technological Age (co-sponsored by the FJC)

ii. Future Aspirations and Trends

1. We are increasingly aware of the ways in which science makes a difference in how justice is administered.

a. For example, artificial intelligence can be used to make risk assessments for probation and supervised release determinations,¹⁸ and developments in neuroscience are increasingly relevant to criminal proceedings on issues such as competency, culpability, and mitigation.¹⁹

b. Recent scientific developments have challenged the ways we determine guilt and innocence. Research in these areas is ongoing, and future judicial training programs should incorporate education on these emerging issues. Two such areas include implicit bias and eyewitness misidentifications.

¹⁸See Administrative Office of the United States Courts, *An Overview of the Federal Post Conviction Risk Assessment* (Sept. 2011), https://www.uscourts.gov/sites/default/files/pdf/training/annual-national-training-seminar/2014/PCRA_2011.pdf.

¹⁹See Nita A. Farahany, *Neuroscience and Behavioral Genetics in U.S. Criminal Law: An Empirical Analysis*, J. L. & Biosciences, 485 (Jan. 14, 2016).

2. Example: Implicit Bias

- a. Implicit biases are our unconscious attitudes or stereotypes. They exist because our brains are programmed to make generalizations so that we can make decisions in our daily lives.
- b. Implicit bias can be harmful when it influences conscious decisionmaking and leads to discrimination or disparate treatment.
 - i. Example: research suggests that implicit bias may play a role in police shootings and other encounters with people of minority racial groups.²⁰
 - ii. Example: research suggests that jurors and judges of one race tend to show implicit bias against defendants of another race in convictions and sentencing.²¹
- c. As research on this topic and its effect on judicial decisionmaking continues to develop, so should judicial training programs on recognizing and combating implicit bias in the courtroom.

3. Example: Eyewitness Misidentifications

- a. Eyewitnesses play an important role in criminal cases, but science indicates that eyewitness identifications are subject to many sources of potential error.²²
- b. Some states, including Massachusetts, have developed model jury instructions that remind the jury to consider

²⁰See Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014), <https://www.motherjones.com/politics/2014/12/science-of-racism-prejudice/>; Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135 (2012).

²¹Kang et al., *supra* n.20, at 1142, 1146.

²²See National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (2014), <https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>.

these sources of error when they evaluate eyewitness identification testimony.²³

- c. Judicial education on the reliability of eyewitness identifications could help judges better understand the science and could result in fewer wrongful convictions.

²³Massachusetts Supreme Judicial Court, *Model Jury Instructions on Eyewitness Identification*, <https://www.mass.gov/info-details/model-jury-instructions-on-eyewitness-identification-model-eyewitness-identification>; see The Innocence Project, *Cross-Racial Identification and Jury Instruction* (May 20, 2008), <https://www.innocenceproject.org/cross-racial-identification-and-jury-instruction/>.