



## We need a national Justice Index

Such an index would provide state-specific information about our legal system, such as whether courts have sufficient resources to hold jury trials.

BY CARA ANNA AND DAVID UDELL

**A**merica's justice system should not be a mystery, and its workings should be open and understandable to all. But that ideal is far from the truth.

Millions of people each year come to civil court to fight for their homes, their businesses, their families. Many can't afford a lawyer, and states aren't required to give them one. Legal aid groups turn away more than half of the people who come asking. The funding simply doesn't exist. Even in the criminal justice system, with its constitutional right to counsel, we still see "lawyerless courts" where people are arraigned and jailed on their own.

Of course, it's not just about having a lawyer, and it's not just about the poor. In these tough financial times, are courts even functioning? An American Bar Association report in August said courts in most states have seen budget cuts of 10 to 15 percent during the past three years. "The same recession that has led legislatures to reduce access to our justice system has obviously increased the number of people who need it," the report said.

Which states' courts are in the worst condition? Which, despite the challenges, are making litigation simpler and less expensive? It's hard to fix a problem when you can't see clearly what's going wrong. There's no way to tell how one state's legal system is performing or how it compares with others. It's time to change that. We need a national Justice Index.

A Justice Index follows on the innovative idea by Yale law professor Heather Gerken of creating a Democracy Index to evaluate America's election system. A national Justice Index would be a high-profile annual ranking of each state's approach to legal assistance and the way each handles civil and criminal cases. That ranking would be supported by published data that could be mined by policymakers, the media and the courts themselves.

More than 47 million cases are filed in state courts every year, and concerns about the quality of justice are growing. The United States ranked 20th among 23 high-income countries in both access to civil justice and effective criminal justice in the latest international Rule of Law Index, released in June by the World Justice Project. Overall, the experts and others surveyed ranked the United States

52d of the 66 countries, of all incomes, in legal assistance.

Our Justice Index would add state-specific information to this portrait of our legal system, using objective criteria. For example, do courts have sufficient resources for translators and to hold jury trials? For criminal cases, how many days are people held without counsel? How many clients does a lawyer represent at one time? How much does it cost to be caught up in a civil or criminal case? Are communities providing the resources needed by the justice system?

Justice should not have to depend on the serendipity of where one lives, or the happenstance of when one encounters the legal system. Moreover, as budget cuts decimate the courts, we know little about whether the essential capacity of courts—to deliver justice—is being preserved.

Some have tried to evaluate the courts on a limited scale. The clearest attempt at transparency has been in Utah, which has adopted CourTools, a measurement system developed by the National Center for State Courts in 2005, and publishes results online. "They allow us to quantify, rather than speculate about, the impact of recent resource cuts, resource real-

location and system restructuring," Utah Chief Justice Christine Durham said in her annual State of the Judiciary address this past year.

Although states were urged to share information from CourTools so their performances could be compared with others, for the most part that hasn't happened. The Conference of State Court Administrators found that some courts blamed a lack of data, a lack of funding or a lack of agreement among policymakers.

Those arguments, all true in part, are themselves a measure of the justice system's performance. In fact, a Justice Index would help court officials approach state legislatures with a clearer justification for badly needed funding.

Indeed, our goal is to build on the spirit of CourTools by showing whether the justice system has what it takes to do its job fully. Part of the Justice Index can be created from published reports that reveal the need for reform (for example, reports showing state-to-state disparities in funding for legal representation of the poor). Part can be created by building a unified Justice Index Web site that will raise the profile of touchstones that communities

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aspire to achieve with their justice systems. And part can be created by encouraging courts and other institutions to publish more data within their reach, such as the number of people proceeding pro se in cases in which the opposing side has lawyers. For individual courts and for state court systems—for communities small and large—the Justice Index can help establish goals and show performance.

The Justice Index's larger promise is to illuminate for all of us the central importance of our courts in preserving justice in our society. What people most know about the courts comes from lurid headlines of trials gone awry, television shows with eccentric jurists and sensational drama series. Seen in this light, courts are colorful, but their societal value is invisible. Also invisible is the impact on our courts (and on the quality of justice) when we, as a society, fail to protect them.

"I do not know the procedure nor do I have the ability to do so," Clarence Earl Gideon wrote decades ago from a Florida jail. The U.S. Supreme Court's landmark ruling in his favor established the right to counsel in a criminal case. That right has withered. Many people see lawyers only briefly, as public defenders dash among dozens of clients. In civil court, where there is no right to counsel, judges often spend just a few minutes on each case, and budget cuts have led to suspensions of jury trials, shuttering of courthouse doors and unfilled judicial vacancies.

The Justice Index would take such anecdotal problems and present them in the context of what courts are doing elsewhere in the country. Some officials

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The Justice Index would document how the right to counsel has withered.

might resent the attention and the work involved. They might point out the risk of states manipulating data to improve their rankings. And there are also the challenges in comparing differing legal systems across state lines.

But many will welcome the new approach, and, after all, these are not good reasons for leaving America's courts unexamined. What is important is that the Justice Index be created. Justice may be blind, but the millions of people every year who need it shouldn't be any longer.

*Cara Anna was the 2011 summer fellow at the National Center for Access to Justice at Yeshiva University Benjamin N. Cardozo School of Law. David Udell directs the center, with its initiative to develop the Justice Index. See [www.ncforaj.org](http://www.ncforaj.org).*

# Reform the Foreign Corrupt Practices Act

A good way would be to create an absolute defense to prosecution when a company self-reports a violation.

BY JON MAY

The U.S. Chamber of Commerce is lobbying Congress to amend the Foreign Corrupt Practices Act to lessen the financial burden on U.S. companies doing business in foreign countries. That burden has cost U.S. companies upwards of a trillion dollars and has made our nation less competitive in the world marketplace. Unfortunately, the most important amendment suggested by the Chamber is likely to make the problem worse. There is a better and simpler solution.

The FCPA is our nation's effort to prevent companies from bribing government officials to secure business in a foreign country. Companies found guilty of paying bribes, or of failing to accurately describe the bribes in their financial records, have had to pay billions of dollars in fines and have faced the possibility of debarment from government contracts. Why so much money? Under U.S. law, companies are responsible for the acts of their employees even if management is unaware of the employee's conduct. A typical scenario involves a company executive hiring a foreign consultant to help negotiate a contract with a particular ministry for the sale of a product or service. Unknown to management, the consultant's fee includes a bribe to a foreign official.

Although intended to level the playing field, the FCPA has actually made it harder for U.S. companies to compete in the marketplace. Money that a company could have used to hire employees, build plants and market its products has been diverted to efforts to show that any illegal conduct was the act of a rogue employee.

If the bribe is uncovered, the company has no defense to criminal liability. Even though the bribe was not authorized by management, no one in management was aware of the bribe and the bribe was specifically against company policy, the company is criminally responsible. The only thing the company can do is try to convince the government not to charge it with a crime.

How does a company do this? Primarily by showing the U.S. Department of Justice that the company had a compliance program designed to prevent such conduct. Companies must evaluate their business environment to identify areas where unlawful conduct might occur. Such an evaluation must include an examination of the business culture of the foreign nation and even a boots-on-the-ground investigation of the company's foreign partners or intermediaries. Companies must promulgate policies that detail permitted and prohibited practices, and employees must receive regular training on permitted prac-

tices and the penalty for noncompliance.

When unlawful conduct is uncovered or suspected, it may be necessary to retain the assistance of outside investigators to interview witnesses and conduct electronic and financial audits. And finally, companies that uncover criminal conduct are expected to demonstrate their commitment to the law by immediately disclosing that conduct to the authorities. If DOJ believes that the company's efforts were genuine, it will usually agree not to prosecute in exchange for the company entering into a nonprosecution or deferred-prosecution agreement. When the company uncovers the criminal conduct itself and self-discloses, DOJ may also reward the company by permitting it to enter into one of these agreements.

In an effort to lessen this burden of proving compliance, the Chamber has proposed amending the FCPA so that a company would not be responsible "if the individual employees or agents had circumvented compliance measures that were otherwise reasonable in identifying and preventing such violations." But the most likely consequence of such an amendment will be to force companies to expend even larger sums of money on compliance measures as they attempt to demonstrate their reasonableness in the face of irrefutable proof that these measures failed.

A far more effective reform would be to create an absolute defense to prosecution when a company self-reports a violation. Right now, the vast majority of government investigations are the result of companies uncovering fraud and self-reporting violations. A bar to prosecution would create an incentive for companies to allocate resources to those measures best suited to uncovering illegal activities. Employees would still be subject to prosecution for their criminal conduct. But companies would no longer have to worry that self-reporting could lead to financial devastation.

The government lacks the resources to police industry and relies heavily upon the threat of prosecution to encourage businesses to implement what DOJ considers to be best practices. But what DOJ considers best practices are not necessarily the best means of achieving compliance by a particular company operating in a particular country. Catching offenders and turning them in to the government for prosecution would be a far more effective way to enforce the law (what the government really wants) at a fraction of the cost of current compliance regimes (what business really wants). This is the kind of reform the Chamber should be advocating.

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