

2017

THE AGILE COURT: IMPROVING STATE COURTS IN THE SERVICE OF ACCESS TO JUSTICE AND THE COURT USER EXPERIENCE

Erika Rickard

Follow this and additional works at: <https://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Erika Rickard, *THE AGILE COURT: IMPROVING STATE COURTS IN THE SERVICE OF ACCESS TO JUSTICE AND THE COURT USER EXPERIENCE*, 39 W. New Eng. L. Rev. 227 (2017), <https://digitalcommons.law.wne.edu/lawreview/vol39/iss2/2>

This Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University. It has been accepted for inclusion in Western New England Law Review by an authorized editor of Digital Commons @ Western New England University.

THE AGILE COURT: IMPROVING STATE COURTS IN THE SERVICE
OF ACCESS TO JUSTICE AND THE COURT USER EXPERIENCE

*Erika Rickard**

The access to justice movement is under new management. State court judges play a leading role in the policies and priorities to be implemented by legal aid organizations, bar associations, and other civil justice system stakeholders. This Article describes the context of the rise of judicial administration and the access to justice movement, and calls for a renewed focus for judicial leaders to improve the court system itself. Specific recommendations are (1) redesign of court processes; (2) user-focused, incremental, and iterative approach to organizational change; and (3) rigorous evaluation and evidence-based practice.

INTRODUCTION

The movement toward “100 percent access to effective assistance for essential civil legal needs”¹ is increasingly led by state courts.² Beyond the role of neutral arbiter in individual cases, state court judges at the appellate and trial levels oversee administrative and policy responsibilities within the judiciary, and today play a similar role in defining policy goals and programmatic efforts within the broader civil and criminal justice systems.

As state courts expand their leadership roles in access to

* Associate Director of Field Research, Access to Justice Lab at Harvard Law School; Access to Justice Coordinator in the Massachusetts Trial Court (2014–2016). The author extends many thanks to the staff of the Western New England Law Review for their diligent work in editing this article.

1. CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADMINISTRATORS, RESOLUTION 5: REAFFIRMING THE COMMITMENT TO MEANINGFUL ACCESS TO JUSTICE FOR ALL (2015) [hereinafter “RESOLUTION 5”], http://www.ncsc.org/~media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20All_final.ashx [https://perma.cc/MR8D-2YSL].

2. See, e.g., Gerry Singen, *Observing Change*, MGMT. INFO. EXCHANGE J. (2014), <http://www.msf.org/futuresandatj/Observing-Change-article.pdf> [https://perma.cc/QV2R-H2EC]; Jonathan Lippman, *The Judiciary as the Leader of the Access-to-Justice Revolution*, 89 N.Y.U. L. REV. 1569 (2014).

justice initiatives aimed at improving the experiences of court users, a pivotal moment in the civil justice system is at hand.³ What do court users stand to gain from a shift away from legal aid providers as the primary drivers of systemic leadership?

Part I of this Article outlines the evolution of state court systems over the past century—looking at their organizational structures, mandates, and performance measures—and a window of opportunity for improving access to justice through court innovation. Part II links the current court system to other stakeholders' efforts to improve access to justice. Part III calls for a renewed focus on the court system itself that includes (1) fundamental redesign of court processes; (2) user-focused, incremental, and iterative approach to organizational change; and (3) rigorous evaluation and evidence-based court administration.

I. ORGANIZATIONAL CHANGE IN COURT ADMINISTRATION

The American judiciary predates the country's founding: the first court in Massachusetts originated 325 years ago, followed by a proliferation of state and later federal courts.⁴ From the court system's inception through the first half of the twentieth century, the courtroom experience remained largely unchanged: litigation and appeals, primarily conducted by attorneys representing the parties involved. As a consequence, both criminal and civil procedure and their authorizing statutes were drafted with the following assumptions: fully represented parties, with limited technology, and low case volume.⁵ The realities of today's courtrooms belie those assumptions.⁶

Judicial administration has experienced two critical transformation points. The first is the inception of judicial administration itself, as identified by Roscoe Pound in 1906,⁷ and

3. See Dina E. Fein, *Access to Justice: A Call for Progress*, 39 W. NEW ENG. L. REV. 211 (2017).

4. The Massachusetts "Supreme Judicial Court was established in 1692." *History of the Supreme Judicial Court*, MASS. COURT SYSTEM, <http://www.mass.gov/courts/court-info/sjc/about/history-of-the-sjc.html> [<https://perma.cc/YB5C-RU59>].

5. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN L. REV. 741, 743–44 (2015).

6. See *infra* Part II.

7. Roscoe Pound, Address Before the American Bar Association: The Causes of Popular Dissatisfaction with the Administration of Justice (Aug. 29, 1906), in 14 AM. LAW. 445 (1996).

the second in the court reform movement of the 1960s and 70s. Between those two inflection points, the focus of judicial administration reform efforts concentrated on court “unification” or consolidation.⁸ While the term unification has come to mean different things in different states, the original principles were (1) consolidation of previously duplicative courts with overlapping jurisdictions, (2) centralization of rule-making and administrative policy-making authority within the court system, and (3) clear boundaries that limited the role of the other branches of government in court operations.⁹

While unification had been sought for decades, implementation accelerated dramatically after World War II, as part of a host of court “reforms . . . adopted to deal with such issues as efficiency, timeliness and fairness, accountability, inadequate methods of judicial selection and discipline, excessive political influence, and lawyers manipulating the legal system.”¹⁰ While most state courts have made significant changes, consensus on court organization and court governance has yet to emerge.¹¹ In many states, there continues to be significant overlap of authority, governance, and jurisdiction, both geographically and along the organizational chart.¹² The National Institute of Justice developed a typology of court organizational structures, which continues to be used by the National Center for State Courts.¹³ Court systems can

8. LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION, 1987–2004 (Oct. 2007) (citing LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY (2001)). “The movement focused on consolidating state trial courts, creating state-centralized court administrations for budgetary and regulatory purposes, and increasing professionalism among court judicial, clerical, and administrative staff.” *Id.*

9. William Raftery, *Unification and “Bragency”: A Century of Court Organization and Reorganization*, 96 JUDICATURE 337, 341–42 (2013).

10. Salmon A. Shomade & Roger E. Hartley, *The Application of Network Analysis to the Study of Trial Courts*, 31 JUST. SYS. J. 144, 146 (2010).

11. Christopher D. Kimbrough et al., *The Verdict Is In: Judge and Administrator Perceptions of State Court Governance*, 35 JUST. SYS. J. 344, 345 (2014).

12. *Id.* at 345. See also *State Court Organization*, NAT’L CTR. FOR ST. CTS., www.ncsc.org/sco [<https://perma.cc/N3UT-PCH2>] (last updated Jan. 9, 2015).

13. Christine M. Durham & Daniel J. Becker, *A Case for Court Governance Principles*, NAT’L CTR. FOR ST. CTS., https://www.ncsc.org/Conferences-and-Events/4th-Symposium/~media/Files/PDF/Conferences%20and%20Events/4th%20Symposium/A_Case_for_Court_Governance_Principles_9_24_10.ashx [<https://perma.cc/58ZA-UPT6>] (citing THOMAS HENDERSON ET AL., THE SIGNIFICANCE OF JUDICIAL STRUCTURE: THE EFFECTS OF UNIFICATION ON TRIAL COURT OPERATIONS (Washington DC: National Institute of Justice 1983)).

be placed into one of four categories based on the relative level of central versus local decision-making authority.¹⁴

In a more universal transformation since the court reform efforts beginning in the 1970s, states have shifted from designating a judge to lead both the adjudicatory and administrative aspects of the court, to professional court administrators.¹⁵ The development of administrative offices of state courts is instructive in this regard. Before 1940, there were no administrative offices of the courts. Before 1950, two had formed; before 1960, the number had risen to thirteen; there were twenty-eight administrative offices prior to 1970, and in 1980, administrative offices of the courts were found in fifty-one jurisdictions, including the District of Columbia.¹⁶ Judicial administration is now recognized as a distinct field, similar to business administration and public administration in the areas of government and policy.¹⁷ In the 1990s, courts saw the development of national models through trial court performance standards¹⁸ and core competencies for court administrators.¹⁹ The American Bar Association Standards Relating to Court Organization, first published in 1974, were modified in 1990 to reflect new areas of focus for nonjudicial personnel, both in leadership and throughout

14. *Id.* The four categories are labeled constellation, confederation, federation, and union.

15. See generally Geoff Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUST. SYS. J. 35 (1976-77).

16. See Durham & Becker, *supra* note 13, at 11. See also ROBERT W. TOBIN, *CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM* 156 (2004) (the first court administrator position was created in Los Angeles Superior Court in 1957).

17. MALCOLM M. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* (Basic Books, 1983). One indicator of the emergence of judicial administration as a field is the formation of the National Association of Court Management in 1985, as a merger of the National Association for Court Administrators (formed in 1968) and the National Association of Trial Court Administrators (which formed in 1965). See, e.g., Lawrence G. Mayers & Norman Meyer, *National Association of Trial Court Administrators (NATCA): History*, https://nacmnet.org/sites/default/files/AboutUs/NATCA%20History_Revised%202012.pdf. [<https://perma.cc/7PMW-5F3D>]. Trial courts were first studied as organizations in 1967. ABRAHAM S. BLUMBERG, *CRIMINAL JUSTICE* (Quadrangle Books, 1967).

18. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, *TRIAL COURT PERFORMANCE STANDARDS AND MEASUREMENT SYSTEM* (1997) <https://www.ncjrs.gov/pdffiles/161569.pdf> [<https://perma.cc/FC3C-KCMS>].

19. See NAT'L ASS'N OF COURT MGMT., *REVISING CORE COMPETENCIES*, <https://nacmnet.org/sites/default/files/pdf/CoreCompetenciesRevision.pdf> [<https://perma.cc/E2WV-67J7>].

the court system.²⁰

Judicial administration has become more complex, both in terms of the size and expectations of administrative staff,²¹ and in terms of the role of the court itself.²² State trial courts have expanded everything from the level of oversight that judges have over the course of litigation, to the ways to resolve disputes, to the very problems that can be heard and addressed by the court in the first place.²³ The proliferation of specialized and problem-solving courts is the clearest example: courts are filling gaps that exist in the social services delivery system, addressing heretofore unmet needs and addressing novel legal as well as systemic problems in society.²⁴ Judicial leadership is critical to ensuring these new topics

20. Commission on Standards of Judicial Administration, *Standards Relating to Court Organization*, A.B.A. (1974); Judicial Administration Division, *Standards Relating to Court Organization*, A.B.A. (1990) (expanding on the role of planning, executive leadership, nonjudicial personnel, and uniform delivery of services across a given court system).

21. See John A. Clarke & Bryan D. Borys, *Usability is Free: Improving Efficiency by Making the Court More User Friendly*, in *FUTURE TRENDS IN ST. CTS.* 2011 76, 76–77 (2011); MAUREEN SOLOMON & DOUGLAS K. SOMERLOT, *CASEFLOW MANAGEMENT IN THE TRIAL COURT: NOW AND FOR THE FUTURE* (Am. Bar Ass'n, 1987) (caseflow management role); RICHARD ZORZA, *NATIONAL CENTER FOR STATE COURTS, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS* (2002). “In 2011, two-thirds of state administrative court offices had full responsibility for judicial education and court technical assistance,” while at least forty-eight jurisdictions (including the District of Columbia) had an administrative staff for information technology, state court statistics, and research and planning. RON MALEGA & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *STATE COURT ORGANIZATION*, 2011 1, 9 (Nov. 2013), <http://www.bjs.gov/content/pub/pdf/sco11.pdf> [<https://perma.cc/L52C-6TGA>].

22. Clarke & Borys, *supra* note 21, at 76 (describing a “sudden recent burgeoning of responsibilities, many of which are new to the justice system”) (citing CAROL R. FLANGO ET AL., *NATIONAL CENTER FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2007* (2007)). Clarke & Borys outline several examples of the expanding role of the judiciary, including “[h]ealth and social-welfare services, as in drug courts, homeless courts, mental health courts, housing courts, etc. . . . [p]ublic education; and [t]he supervision and care of those deemed unable to care for themselves (i.e., in probate guardianships and in foster care).” *Id.* (citation omitted).

23. Tobin, *supra* note 16, at 239. Managerial judging is another expansion of the judicial role, which began in public law litigation in the mid-twentieth century. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Managerial judging quickly expanded beyond public law litigation. Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 675 (1988).

24. See generally GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* (The New Press, 2005).

and issues are approached ethically and adequately by the courts.

With judges wearing more hats and courts serving more functions, an opportunity for judicial administration to cross a third threshold has come: a focus on access to justice and the court user experience. As court reform has led to strengthened judicial administration and centralization of administrative as well as adjudicative authority, state courts have built a foundation to begin to reflect on their practices and operations, and to better understand and address the needs of court users, including attorneys, law enforcement, state agencies, and of course, people who are in court because of a criminal or civil legal matter.

II. THE COURT'S ROLE IN ACCESS TO JUSTICE INITIATIVES

The court is part of a larger justice ecosystem, including the bar, legal aid, and law schools. While distinct and at times in competition with one another, the institutions of legal aid and the private bar have joined forces over the past several decades in pursuit of access to justice.²⁵ As the civil justice system within a state or region comes together to expand and build out the continuum of available legal services, different approaches to collaboration and communicating across organizational divides have emerged. State-level access to justice commissions bring together key stakeholders of the legal community, including courts, legal aid providers, the private bar, area law schools, and other partners, to address common goals in the interest of increasing access to justice.²⁶ Civil justice system initiatives, whether led by commissions or others, focus on addressing the needs of underserved populations, most often those who seek to address legal problems without counsel.²⁷

25. Singen, *supra* note 2, at 6 (explaining three separate metamorphoses in the access to justice movement: federal support of legal aid in the 1960s, private attorney involvement in legal aid in the 1980s, and a third metamorphosis currently underway, expanding the role of judicial leadership in the movement).

26. Laurence H. Tribe, *Keynote Remarks at the Annual Conference of Chief Justices*, U.S. DEP'T OF JUST. (July 26, 2010), <https://www.justice.gov/opa/speech/laurence-h-tribe-senior-counselor-access-justice-keynote-remarks-annual-conference-chief> [https://perma.cc/9MTD-4U4U].

27. Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 951 (2009) ("For the purposes of this Article, 'equal access to justice' would mean that different groups in a society would have similar chances of obtaining similar resolutions to similar kinds of civil justice problems.").

State courts play a central role in these efforts.²⁸ First and most obvious, state and local courts are the locus for a vast majority of the resolution of these legal problems. Beyond that, judges often direct the priorities of the state in expanding the continuum of services, including written and interactive self-help tools;²⁹ court-based pro bono opportunities;³⁰ and expanding the role of non-lawyers in assisting court users.³¹ Access to justice commissions themselves demonstrate the power of the court system's role: The state judiciary oversees the access to justice commission in a vast majority of jurisdictions, and, in most jurisdictions, it was a state supreme court rule that created the commission.³²

Policy and practice across the civil justice system is driven largely by judicial leadership, and can have a dramatic effect on the ecosystem as a whole. Increasing access to attorneys is one example.³³ The well-acknowledged concept of the justice gap—the simultaneous “glut” of attorneys without substantive work and glut of potential clients who cannot find and afford counsel³⁴—has yielded some response, from both the private bar and individual law school incubator³⁵ and accelerator³⁶ programs. In addition to full representation in judicial and administrative proceedings,

28. State court leadership, both judges and administrators, have embraced this role. See RESOLUTION 5, *supra* note 1.

29. Dan Jackson & Martha F. Davis, *Gaming a System: Using Digital Games to Guide Self-Represented Litigants*, at 1 (Ne. U. Sch. of L., Ne. Pub. L. & Theory Faculty Res. Papers Ser. No. 252-2016, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2719926 [<https://perma.cc/C3Q9-26TM>].

30. Courthouse-based pro bono assistance include, e.g., alternative dispute resolution and conciliation programs, lawyer for the day programs, and advice clinics.

31. Russell Engler, *Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice for Middle-Income Earners*, in MIDDLE INCOME ACCESS TO JUSTICE 145–72 (Michael J. Trebilcock, et al. eds., 2012).

32. ABA RESOURCE CTR. FOR ACCESS TO JUST. INITIATIVES, STATE ACCESS TO JUSTICE COMMISSIONS: CREATION, COMPOSITION, AND FURTHER DETAILS, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_commissions_table.authcheckdam.pdf [<https://perma.cc/U2FY-V3GF>].

33. Steinberg, *supra* note 5, at 786–805 (2015).

34. Emily A. Spieler, *The Paradox of Access to Civil Justice: The “Glut” of New Lawyers and the Persistence of Unmet Need*, 44 U. TOL. L. REV. 365, 367 (2013). See also Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373 (2005).

35. Spieler, *supra* note 34, at 400 n.147.

36. Jeffrey J. Pokorak et al., *Stop Thinking and Start Doing: Three-Year Accelerator-to-Practice Program as a Market-Based Solution for Legal Education*, 43 WASH. U. J.L. & POL'Y 59 (2013).

through support for legal aid and the right to counsel in civil legal matters,³⁷ access to justice efforts include building the private attorney base for addressing the legal needs of low- and moderate-income households.³⁸ Alternative business models, such as fee-shifting (contingency)³⁹ and limited scope representation (unbundling) make it possible for attorneys to represent low-income clients as part of private practice. The court system has a leading role in the adoption and utilization of these forms of practice.⁴⁰

Limited scope representation or unbundling is often viewed as the next best alternative after full representation.⁴¹ Fee-based unbundled legal services can be more substantive than the forms of limited services most often observed in the pro bono context, which often focus on case initiation and basic procedures.⁴² Jurisdiction-specific quirks and peculiarities can strengthen or stifle uptake of limited representation by private practitioners. This includes, for example, clarification around what can be included in an attorney-

37. AMERICAN BAR ASSOCIATION, REP. TO THE H. OF DELEGATES NO. 112A (2006); JUD. COUNCIL OF CAL., FACT SHEET: PILOT PROJECTS UNDER THE SARGENT SHRIVER CIVIL COUNSEL ACT (AB 590 [FEUER]) (Jan. 2010), http://www.courts.ca.gov/partners/documents/AB_590.pdf [<https://perma.cc/86YG-NU74>]; Jennifer Smith, *Rationed Justice*, 49 SUFFOLK U. L. REV. 353, 365 (2016); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37 (2009).

38. See Russell Engler, *Access to Justice and the Role of the Private Practitioner*, 24 KAN. J.L. & PUB. POL'Y 554, 554–56 (2015).

39. Gerry Singen, et al., *Dollars and Sense: Fee Shifting*, in ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES REINVENTING THE PRACTICE OF LAW (Luz Herrera ed., 2014).

40. See Katherine Alteneder & Linda Rexer, *Access to Justice: Consumer Centric Design: The Key to 100% Access*, 16 J.L. IN SOC'Y 5, 21 (2014).

41. Steinberg, *supra* n. 5, at 745. The terminology to describe unbundled services is both varied and lacking. Court rules define the same concept in different jurisdictions as discrete task representation, unbundled legal services, limited scope representation, or limited assistance representation, none of which captures any core concept that would enable potential clients (or attorneys, for that matter) to decide to seek out a bounded attorney-client relationship for a piece of the case. While the language and description of a court rule or standing order has its own intended audience and serves its own purpose, to the extent that branding has an impact on the market for limited representation, it is most assuredly a negative one.

42. Courts can also strengthen unbundled services by overhauling court processes themselves to simplify steps that should not require attorney assistance, freeing up attorneys to assist with more substantive aspects of a case. Steinberg, *supra* note 5, at 804; Jeanne Charn, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L. J. 2206, 2232 (2013). See *infra* Part III.A for extended discussion of court process simplification.

client agreement,⁴³ clear rules on “ghostwriting” legal pleadings,⁴⁴ assurances that judges will not require attorneys to continue on in a case for which they have a limited relationship, and encouragement of limited appearances in the courtroom.⁴⁵ Where court policy is clear, and where local practice is consistent with that policy, limited scope representation flourishes; otherwise, it fails.⁴⁶

As with limited scope representation, court rules and state statutes specifically authorize fee-shifting in certain case types as a mechanism for individuals to recoup the costs of legal fees from opposing parties. Law firms that rely on fee-shifting, much like contingency fee practices in personal injury law, take an inherent risk in that they only recover the cost of representation in the event that they prevail in litigation or successfully settle. Unlike personal injury, fee-shifting practice in areas such as consumer debt and landlord-tenant law cannot rely on taking a percentage of the overall damages, other award, or settlement, as the underlying awards are insufficient. Fee-shifting statutes, therefore, permit the prevailing party to recoup reasonable attorneys’ fees for the costs of litigation itself.⁴⁷ This is where judicial discretion can make or break fee-shifting practice. Even when authorized by statute, the court’s discretion is necessary and indeed critical to a robust fee-shifting practice within the private bar: judges determine both (a) whether they will grant fee-shifting at all, and (b) the amount that would be reasonable for the specific case. Fee-shifting practice is riskiest in jurisdictions where judges are unpredictable in their

43. Mary Helen McNeal, *Limited Legal Assistance*, 67 FORDHAM L. REV. 1819, 1822–24 (1999); *Testimony of Alan W. Houseman on Behalf of the Center for Law and Social Policy to the National Legal Aid and Defender Association*, A.B.A. (July 3, 2000), http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/houseman10.html [https://perma.cc/LE3M-83RL].

44. Steinberg, *supra* note 5, at n.181 (citing Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners’ Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 276 (2010)).

45. *Id.* at 773–74; Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 461 (2011).

46. For example, while forty-five out of fifty-two jurisdictions (including the District of Columbia and Puerto Rico) authorize unbundling legal services, only nine of those jurisdictions also provide training for judges on effective use of unbundled legal services in their courtrooms. *Support for Self-Represented Litigants*, THE JUSTICE INDEX 2016 <http://justiceindex.org/2016-findings/self-represented-litigants/> [https://perma.cc/9QW5-GAKS] (responses to questions six and seven).

47. See, e.g., MASS. GEN. LAWS ch. 186, § 14 (2016), for a fee-shifting statute.

application of fee-shifting statutes and awarding of reasonable attorneys' fees. Unlike limited scope representation, fee-shifting has not enjoyed formal support or recognition from many court systems. Absent support from the judiciary, it is hardly surprising that this practice is underutilized by attorneys and under-recognized by other institutions within the civil justice ecosystem.

Access to attorneys is but one example of the ways that court policies affect the larger civil justice ecosystem. Courts, and more precisely court leaders, bear significant responsibility for the external access to justice initiatives that thrive in their jurisdiction. This Article does not discount that role, but rather proposes a focus inward, bringing judges and court administrators to reflect on the ways that court business process and practices can better serve all stakeholders, including lawyers and litigants.

III. RETHINKING THE ROLE OF THE COURT IN THE ACCESS TO JUSTICE MOVEMENT

The expanded programmatic, policy, and administrative functions of state courts provide a new opportunity for the access to justice movement. In addition to the role of the judiciary as the leader or driver of multi-stakeholder efforts, or of expanding the pool of available resources, court leaders are in a unique position to change the administration of justice within their own walls. Ensuring access to justice requires reimagining the court system as one that views its role from the outside in, from the perspective of court users, and revises or radically changes its system and business processes accordingly. This change in perspective can be uncomfortable. It requires more transparency and more reflection on what works, and more pointedly what does not work, in current operations as well as future initiatives. This Part proceeds in three related steps. The first is an explanation of what a focus on court processes could generate. The second describes one approach to implementing court innovations. Finally, the third addresses evaluation of the kinds of changes and innovations described in the previous sections.

A. *Focus on the System Itself*

For at least the past twenty-five years, courts have worked to address the needs of people navigating the court system without an

attorney.⁴⁸ What that has often meant, in practice, is developing additional intermediaries to explain and provide resources to litigants, with the goal of assisting them in navigating the current system.⁴⁹ Legal workshops, pro bono advice hotlines, self-help packets, and legal information websites, for example, are all intermediaries, and constitute the primary approach to solving “operator errors” in navigating the courts.⁵⁰ Legal aid organizations, pro bono programs, and even courts themselves too often develop instructions, guides, and legal assistance to help litigants navigate a complicated process while “ignoring the ways in which legal rules, procedures, courts and agencies make resolving legal problems unnecessarily complex, time-consuming and opaque.”⁵¹ While some of these intermediaries may indeed be critical to ensuring access to justice, there are two critical gaps in the conversation: (1) assessment of which intermediaries are effective for which needs;⁵² and (2) evaluation of underlying court processes.⁵³

Court processes are less frequent targets of access to justice reform recommendations, though their impact is perhaps even greater.⁵⁴ As Professor Jeanne Charn and access to justice expert

48. Maricopa County Superior Court in Phoenix, Arizona, established the first self-help program in a courthouse in 1995. See NICOLE ZOE GARCÍA, EXAMINING DISSOLUTIONS AMONGST SELF-REPRESENTED LITIGANTS IN THE SUPERIOR COURT OF ARIZONA IN MARICOPA COUNTY 10–11 (May 2014), <http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2014/Dissolutions%20among%20Self-Represented%20Litigants.ashx> [<https://perma.cc/BD28-9WUE>].

49. Of course, attorneys and other intermediaries are all critical pieces to a functioning justice system. See, e.g., JULIE MACFARLANE, TREASURER’S ADVISORY GRP. ON ACCESS TO JUSTICE, THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT: IDENTIFYING AND MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS: FINAL REPORT 522 (May 2013).

50. Paula Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 CT. REV. 8, 14 (2003) (“[T]he way for courts to address the logistical problems of self-represented litigants is to stop thinking of common mistakes as ‘operator error’ and to begin thinking about how to correct the system errors that frequently cause operators to fail.”).

51. JEANNE CHARN & RICHARD ZORZA, BELLOW-SACKS ACCESS TO CIVIL LEGAL SERVS. PROJECT, CIV. LEGAL ASSISTANCE FOR ALL AMERICANS 17 (2005), <http://www.courts.ca.gov/partners/documents/bellow-sacks.pdf> [<https://perma.cc/838K-6GTT>].

52. See *infra* Part III.C.

53. See Daniel J. Hall & Lee Suskin, *Reengineering Lessons from the Field*, in FUTURE TRENDS IN ST. CTS. 2010 36 (2010).

54. See SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, ISSUES

Richard Zorza articulated in their call for civil access to justice for all,

[w]e will not solve the access problem by focusing exclusively on getting help to consumers while ignoring the ways in which legal rules, procedures, courts and agencies make resolving legal problems unnecessarily complex, time-consuming and opaque. Simplifying, explaining, and de-mystifying legal processes may turn out to be one of the most cost- and outcome-effective strategies for increasing access to justice.⁵⁵

As is described elsewhere in this issue, court simplification is fundamental to access to justice.⁵⁶ From the perspective of court managers and judicial leaders, simplification of court processes is at once the most challenging and most obvious place to start.⁵⁷ Providing pro bono lawyers or writing explanatory self-help information may be important, but they are not the forte of the court administrator or the judge—the court is not in the best position to provide these resources, relative to other justice system partners.⁵⁸ At the same time, no other part of the justice system has the power to change court procedures, litigation alternatives, or court forms.⁵⁹ The role of the judge is critical. While judicial leaders hold persuasive power that can be used to enlist or expand available intermediaries (primarily attorneys), they have both the authority and the imperative to direct changes to court processes.

Process simplification is simultaneously a way to improve the accessibility of the courts for resolving disputes, and improve system performance. Court administration efforts in the past

FOR EXPLORATION, EXAMPLES, CONTACTS, AND RESOURCES (2008); Steinberg, *supra* note 5, at 786 & n.255.

55. Charn & Zorza, *supra* note 51, at 17.

56. See Fein, *supra* note 3.

57. It is also perhaps constitutionally required. *Turner v. Rogers*, 564 U.S. 431, 444–45 (2011). Scholars argue that *Turner* creates an obligation for state courts to pursue procedural reform. See, e.g., Steinberg, *supra* note 5, at 793.

58. *But see* JUDICIARY CIVIL LEGAL SERVS. IN N.Y., FISCAL YEAR 2015–2016 REQUEST FOR PROPOSALS: APPLICATION FORMS AND INSTRUCTIONS, <https://www.nycourts.gov/admin/bids/PDFs/JCLS-RFP-2015.pdf> [https://perma.cc/7K2W-JHQS] (In 2015 in New York State, the judiciary gave \$15 million of its own annual budget, in addition to a separate legislative budget, to civil legal services for the poor).

59. Referring to stakeholders listed *supra* Part II. State legislatures also play a role, to varying degrees, in mandating procedures, and even the language to be used on certain court forms.

century to move decision-making power to the central judiciary level assumes that it will lead to precisely these kinds of improvements. Customer service and the court user experience, particularly the experience of court users who are in the courts without a lawyer, go hand-in-hand with improved court function and business processes.⁶⁰ For example, reducing the number of visits to a courthouse serves litigants' interests, while also improving court operations. They also have the important secondary effect of clarifying just which court processes do require an intermediary, and which do not.

Despite the benefits in the courtroom and to court operations, court simplification efforts are met with resistance from court managers and judges alike.⁶¹ It is a challenge for courts to rethink their longstanding ways of doing business. Some courts have nonetheless begun to innovate along these lines, ranging from revisions to antiquated service and notice requirements⁶² to informal trial alternatives,⁶³ to opt-out proportional discovery rules that reduce court delay and confusion among litigants,⁶⁴ to shifting burdens in order to establish clear obligations for powerful repeat actors in consumer debt and foreclosure cases.⁶⁵ More provocative

60. THOMAS A. HENDERSON ET AL., *STRUCTURING JUSTICE: THE IMPLICATIONS OF COURT UNIFICATION REFORMS* 90 (U.S. Dep't of Justice, 1984). (“[O]rganizational changes have greater impact when linked directly to management structure, operation, and performance at the trial court level.”).

61. Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 *DRAKE L. REV.* 845, 851–55 (2012).

62. Alyce Roberts & Stacey Marz, *Alaska Court System Legal Notice Website*, 30 *CT. MANAGER* (2015–2016) as reprinted in *TRENDS IN STATE CTS. 2016: SPECIAL FOCUS ON FAMILY LAW & COURT COMMUNICATION* (2016), <http://www.ncsc.org/~media/Microsites/Files/Trends%202016/Alaska-Court-System.ashx>. [<https://perma.cc/UC9V-S7K2>]; Steinberg, *supra* note 5, at n. 308 (citations omitted).

63. William J. Howe & Elizabeth Potter Scully, *Redesigning the Family Law System to Promote Healthy Families*, 53 *FAM. CT. REV.* 361, 363–64 (2015) (informal domestic relations trial program in Oregon).

64. Philip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2015 *MICH. S. L. REV.* 933, 941–42 (2012); Rebecca Love Kourlis & Brittany K.T. Kauffman, *Rule Reform, Case Management, and Culture Change: Making the Case for Real and Lasting Reform*, 24 *KAN. J.L. & PUB. POL'Y* 493, 498 (2015) (citing AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *FINAL REPORT ON THE JOINT PROJECT OF THE ACTL TASK FORCE ON DISCOVERY AND IAALS* 7, 10 (rev. ed. 2009), http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf [<https://perma.cc/XFR8-Q35F>]). See also *id.* at 514–16 (addressing electronic discovery pilots).

65. Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed*

suggestions focus on the role of the judge in the courtroom itself, beyond case management and into the judge's engagement with the litigants and the case.⁶⁶

B. *An Agile Approach to Pilot Innovations*

Simplifying court processes is perhaps the most fundamental shift in the courts. How to go about that shift, or any other court innovation, is a separate question. Fortunately, the advent of professional court administration has meant the adoption of tools and approaches that have proven successful in other fields. Methodologies from the private sector that have fed into decision-making in the public sector are crossing into the judicial branch. More recently, philosophies and work methodologies from the tech industry have also left their mark on other private sector industries, and, in due course, on the public sector as well.⁶⁷ The terms and some of the concepts vary from technology concepts like Agile,⁶⁸ to the more seasoned business concepts of Lean⁶⁹ and Six Sigma,⁷⁰

by *Debt Buyers*, 26 LOYOLA CONSUMER L. REV. 179 (2014); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 744 (1998) (discussing foreclosure).

66. Zorza, *supra* note 61, at 863–66 (case management and a few other examples); see generally Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005). Cf. Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 367–68 (2008) (recommending that judges take a more active role in court hearings involving pro se litigants).

67. See, e.g., VERSIONONE, THE 10TH ANNUAL STATE OF AGILE 5 (2016) (nearly 75% of respondents using Agile methodology are from industries outside of software).

68. Agile methodology has its origins in software development, and can be characterized as “adaptive, iterative and incremental, and people oriented.” Noura Abbas et al., *Historical Roots of Agile Methods: Where Did “Agile Thinking” Come From?*, in AGILE PROCESSES IN SOFTWARE ENGINEERING AND EXTREME PROGRAMING 94–103 (Pekka Abrahamsson et al. eds., 2008).

69. Originating in the manufacturing industry by the Toyota car company, lean thinking has been applied to management settings outside of manufacturing, and is characterized by streamlining processes to improve efficiency and eliminate waste. JAMES P. WOMACK & DANIEL T. JONES, *LEAN THINKING: BANISH WASTE AND CREATE WEALTH IN YOUR CORPORATION* (Simon & Schuster, 1996); JAMES P. WOMACK, DANIEL T. JONES & DANIEL ROOS, *THE MACHINE THAT CHANGED THE WORLD* (Macmillan Pub. Co., 1990).

70. A term originally coined by Motorola, Six Sigma methodology focuses outside lean manufacturing and focuses on continuous efforts to reduce variability or unpredictability, making decisions based on data, and achieving commitment across the organization, rather than top-down mandates. D. Hutchins, *The Power of Six Sigma in*

hearkening to the older lessons of Total Quality Management⁷¹ and “continuous improvement.”⁷² While there is variation across these philosophies, the core ingredients that are beginning to enter judicial administration frameworks are the same: iterative and incremental development (hereinafter “IID”)⁷³ that begins with a small piece of a new idea, responds to feedback, and develops a new iteration of the idea.⁷⁴

The language of these concepts may be entering the courts, but the act of incorporating IID has yet to take hold. While institutional barriers are not unique to the judicial branch, any sort of change can be particularly challenging for courts as maintainer of the status quo.⁷⁵ Judicial decision-making and adjudicatory authority must be distinguished from administrative decisions, including innovations in court operations beyond the courtroom. Whether the purview of the administrative office or the judge, text message reminders, self-help centers, and document assembly programs that connect court users to relevant information are all

Practice, 4 MEASURING BUS. EXCELLENCE, no. 2, 26–33 (2000); Rob McClusky, *The Rise, Fall and Revival of Six Sigma Quality*, 4 MEASURING BUS. EXCELLENCE, no. 2, 6–17 (2000).

71. A management philosophy that imagines a company culture based on continuous improvements. See generally W. EDWARDS DEMING, *OUT OF THE CRISIS* (MIT Press 1986).

72. Tricia M. Oliver, *Court Reform Continues in Full Swing Five Years After Monan Report Ushers in New Era*, 15 MASS. BAR ASS’N L. J. 1, 6 (2008) (quoting from Boston Globe article (Sept. 17, 2007)). The “high-performing court” is a more widely adopted version of the notion of continuous improvement in court systems more generally. Brian J. Ostrom et al., *Making Continuous Improvement a Reality: Achieving High Performance in the Ottawa County, Michigan, Circuit and Probate Courts*, 51 CT. REV. 106, 112 n.13 (2015).

73. IID originated with the well-known “Plan-Do-Study-Act” approach, which originated in the 1930s. Craig Larman & Victor R. Basili, IEEE COMPUT. SOC’Y, *Iterative and Incremental Development: A Brief History*, 36 COMPUTER 2, 2 (June 2003), <http://www.craiglarman.com/wiki/downloads/misc/history-of-iterative-larman-and-basili-ieee-computer.pdf> [<https://perma.cc/T926-SEB8>].

74. BRIAN J. OSTROM ET AL., *TRIAL COURTS AS ORGANIZATIONS* (Temple U. Press 2007); BRIAN OSTROM & ROGER HANSON, NAT’L CTR. FOR ST. CTS., *ACHIEVING HIGH PERFORMANCE: A FRAMEWORK FOR COURTS* 51–52 (2010), https://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/CTF/Achieving_HPC_April_2010.ashx [<https://perma.cc/6XPV-PDJ3>] (recommending responsiveness and adaptation as goals for a high-performance court).

75. Bruce Tonna et al., *Future of the Courts: Fixed, Flexible, and Improvisational Frameworks*, 44 FUTURES 802, 810 (2012) (“We must anticipate and address potential resistance to changes to the court system. Traditionally, justice in the U.S. has focused on maintaining the status quo; legitimacy is the presumed outcome of this consistency.”).

examples of innovations contemplated by courts that lend themselves to responsive design techniques.

The decentralized leadership structure of state courts may be an asset to bringing IID into court culture. This may seem counter-intuitive in a court system: courts typically have complex and fragmented networks of leadership, which can slow organizational change. While this can stymie some efforts, it has also resulted in its own workaround solution: pilots. Piloting new initiatives has long been the approach that courts have taken to developing new ideas, as pilots lower both the risk of failure and the number of decision-makers that must come to consensus about the details of a given project. Courts have proven themselves to be institutionally well-suited to piloting a new initiative and iterating on that pilot before scaling it out to a larger setting. They are already in the practice of starting with a pilot phase and then scaling up. The piece that is missing is the iterative element: a feedback loop of prototyping, soliciting input, and incorporating that feedback into a revised end product.

The latest iteration of the IID concept is design thinking.⁷⁶ Much of the basic elements are the same as previously discussed, with a stronger emphasis on user input and user feedback. In order to fully incorporate design thinking and iterate on a new idea, courts will benefit from seeking user input, both as an initial matter about the current system,⁷⁷ and as a responsive tool to provide rapid feedback on innovations in the field. The most challenging step to incorporating design thinking in particular, and IID in general, is the incorporation of user input and stakeholder feedback. Like the judicial decision-making process itself, judicial administration and court policy must become “deeply informed

76. Margaret Hagan, *Design Thinking and Law: A Perfect Match*, ABA: LAW PRAC. TODAY (Jan. 2014), http://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/2014/january14/design-thinking-and-law.html [https://perma.cc/U4LA-Y27D].

77. See, e.g., SOC. & ECON. SCIS. RESEARCH CTR., WASHINGTON STATE SUPREME COURT CIVIL LEGAL NEEDS STUDY UPDATE: CIVIL LEGAL PROBLEMS EXPERIENCED BY LOW-INCOME HOUSEHOLDS IN WASHINGTON—2014 (2015), <http://ocla.wa.gov/wp-content/uploads/2015/06/CLNS14-Executive-Report-05-28-2015-FINAL1.pdf> [https://perma.cc/3MUB-2FPD]; DANNA MOORE & ARINA GERTSEVA, SOC. & ECON. SCIS. RESEARCH CTR., WASHINGTON STATE CIVIL LEGAL NEEDS STUDY UPDATE: RESULTS OF PROBABILITY AND NON-PROBABILITY SURVEY (2015), <http://ocla.wa.gov/wp-content/uploads/2015/07/N-PS-Report-07-16-15-Draft-Final-JB-7-24-15.pdf> [https://perma.cc/AFF6-9M6E].

about the institutions with which legal actors interact[.]”⁷⁸ While some access to justice commissions, legal aid organizations, and bar associations include clients or other non-lawyer constituents among their membership,⁷⁹ courts by their very nature do not. Courts represent the neutral ground for resolving disputes between parties, and are not built to accommodate and incorporate feedback through channels other than appeals of judicial decisions.⁸⁰ Adding feedback and iteration to the existing protocols for pilot initiatives would require completely new structures for both seeking and obtaining feedback, and for making changes to an initiative once it is already in the field.

Strengthening internal communications is a prerequisite for seeking input from outside stakeholders. Within courts there is a disconnect between leadership and line staff. The chain of decision-making creates a wide gap between decisions made by court leadership and the on-the-ground reality in courthouses. In focus groups with court staff, for example, front-line staff in courtrooms and clerk counters frequently describe wish lists of resources and materials that already exist, but of which they are unaware.⁸¹ This lack of information is bidirectional: new technology, court materials, or “best practices” are often developed without input from court staff, let alone court users.

Building a system for receiving input from court staff is itself an innovation that can be iterated upon, and perhaps scaled to creating a structure for receiving court user feedback in the future. This is no simple task, and requires both visionary judicial leadership and expert court administration to accomplish.

C. *Rigorous Evaluation and Evidence-Based Practices*

Where Recommendation 2 focuses on short iterations of receiving and responding to feedback, Recommendation 3 takes a

78. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 882 (2003).

79. See e.g., MASS. ACCESS TO JUSTICE COMM’N, FINAL REPORT OF THE SECOND MASSACHUSETTS ACCESS TO JUSTICE COMMISSION 13 (2015), <http://www.mass.gov/courts/docs/sjc/docs/massachusetts-access-to-justice-commission-final-report-april-2015.pdf> [<https://perma.cc/Q5MQ-D8FD>].

80. Henderson, *supra* note 60.

81. E.g., Erika J. Rickard, *Addressing the Needs of Self-Represented Litigants: Court Staff Focus Groups*, Massachusetts Trial Court (Oct. 22, 2015) (on file with the author).

longer view. Building on a culture shift that focuses inward at its own processes and pilots innovations in an iterative fashion, the next step for a state court system is to evaluate its access to justice initiatives in order to assess their impact and ensure their continuous improvement.

Momentum is turning toward evaluation and assessment efforts within the civil justice system as a whole. Legislators, foundations, and other funders are interested in data-driven practices, and explicitly encourage various elements of the civil legal justice system to prioritize evaluation and assessment efforts.⁸² In the context of state courts, the Conference of Chief Justices (CCJ) and Conference on State Court Administrators (COSCA) call for “realistic and measurable outcomes” as central to any plans to move toward 100% access to justice.⁸³ Despite this language, most initiatives fail to incorporate feedback or meaningful evaluation components. The truth of the matter is, we do not know which legal interventions work, and for whom.⁸⁴ While innovations

82. See, e.g., *Access to Justice*, AMERICAN BAR FOUND., <http://www.americanbarfoundation.org/research/A2J.html> [https://perma.cc/H5Q3-5MZE]; Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 102 (2013); CANADIAN LEGAL RES. & WRITING GUIDE, legalresearch.org [https://perma.cc/3H5J-RMGW]; *Presidential Memorandum—Establishment of the White House Legal Aid Interagency Roundtable*, WHITE HOUSE: BRIEFING ROOM Sec. 4(v) (Sept. 24, 2015), <https://www.whitehouse.gov/the-pressoffice/2015/09/24/presidential-memorandum-establishment-white-house-legal-aid-interagency> [https://perma.cc/3JPS-H6GG] (White House Legal Aid Interagency Roundtable (WH-LAIR) created to “advance relevant evidence-based research, data collection, and analysis of civil legal aid and indigent defense, and promulgate best practices . . .”). At the time of this Article, it is unclear whether the current presidential administration will continue this program.

83. RESOLUTION 5, *supra* note 1.

84. The American Bar Association’s Commission on the Future of Legal Services series of white papers in South Carolina’s Law Review is a survey of “what we know and need to know”—citing current understanding about civil right to counsel, non-lawyers and affordable legal services, legal services outreach and intake, and recognition of legal/justiciable problems. See generally 67 S.C. L. REV. vii; & 67 S.C. L. REV. 193 (2016); Tonya L. Brito et al., *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223, 224 (2016) (right to counsel) (citing Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 38 (2010)); D. James Greiner, *What We Know and Need to Know About Outreach and Intake by Legal Services Providers*, 67 S.C. L. REV. 287, 293 (2016) (outreach and intake); Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 438 (2016) (nonlawyers); Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 444 (2016) (legal/justiciable problems).

have multiplied, efforts to understand whether those innovations are working have not kept pace.⁸⁵

Assessment requires clear identification of goals, data to measure performance, and standards for data analysis. Judicial leaders may not be experts in any of these elements, but many administrative offices within court systems now include research divisions that may have the capacity or the ability to acquire it. First and foremost, before identifying the success of any new innovation, is the fundamental question: “What should we measure?”⁸⁶ Put differently, what are the goals of the innovation? Courts would benefit from stakeholder input as to the goals for enhanced access to justice. Among those goals, for example, may be increased procedural fairness;⁸⁷ more *just* case outcomes;⁸⁸ reduced court delay;⁸⁹ and long-term socio-economic outcomes.⁹⁰ There may be any number of goals or intended outcomes of a given project or court innovation, but the key is to articulate these goals at the outset in order to effectively measure them.

Once courts—in collaboration with justice system stakeholders—identify measurable goals, the next step is to develop metrics for evaluating progress. Some tools in the court and legal aid settings are already in progress.⁹¹ As a starting point,

85. Gillian K. Hadfield & Jaime Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 21, 22 (Samuel Estreicher & Joy Radice eds., 2016), <http://ssrn.com/abstract=2547664> [<https://perma.cc/FA38-RG5C>] (citations omitted) (“[S]ystematic efforts to collect data about the health of legal systems for ordinary individuals are few and far between.”).

86. Meredith J. Ross, *Introduction: Measuring Value*, 2013 WIS. L. REV. 67, 69 (2013).

87. See Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 29 (2007); Kevin Burke & Steve Leben, *The Evolution of the Trial Judge from Counting Case Dispositions to a Commitment to Fairness*, 18 WIDENER L.J. 397, 404–08 (2009).

88. Just outcomes as identified by the stakeholders. See generally Sandefur, *supra* note 27 (comparing various methods to dispute resolution, the policies that shape those methods, and the substantive resolutions that result).

89. J. DONALD MONAN ET AL., THE VISITING COMMITTEE ON MANAGEMENT IN THE COURTS: REPORT TO CHIEF JUSTICE MARGARET MARSHALL 9 (2003), <http://www.mass.gov/courts/docs/sjc/docs/report-2003-management-in-the-courts.pdf> [<https://perma.cc/TQ38-SSUD>].

90. See, e.g., BOS. BAR ASS’N, STATEWIDE TASK FORCE TO EXPAND CIV. LEGAL AID IN MASS., INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 1, 1 n.1 (2014).

91. Albiston & Sandefur, *supra* note 82, at 101 (observing that “[a]ccess to Justice (A2J) research is in the midst of a renaissance.”).

the National Center for Access to Justice (NCAJ) and the Self-Represented Litigant Network (SRLN) have each developed different indices and inventories for comparing the kinds and qualities of different court services and court-based resources.⁹² The federal Department of Justice has developed assessment and planning tools for state courts to measure their efforts at providing language access to litigants with limited English proficiency, as required by Title VI of the Civil Rights Act of 1964.⁹³ Each of these tools provides a system for processing indicators about the status quo, and yielding some basic findings from those indicators.

National projects like the CourTools and the Court Statistics Project at the National Center for State Courts provide some performance measurement tools, including several uniform metrics, collection methods, and preliminary data analysis within and across court systems.⁹⁴ Beyond these measures, across the national landscape courts tend to lack robust analytical tools. Legal aid organizations, by contrast, have begun to adopt new approaches, such impact analyses to communicate the economic benefits and return on investment into civil legal aid.⁹⁵

The gold standard for evaluating the effectiveness of a program is a randomized study.⁹⁶ As in medicine and other fields,

92. See generally *Measuring Access to Justice*, THE JUSTICE INDEX 2016, justiceindex.org [https://perma.cc/MW4F-AXMF]. SRLN has developed an inventory of self-help services and is in the process of developing a mapping platform. See generally SELF-REPRESENTED LITIG. NETWORK (SRLN), www.srln.org [https://perma.cc/6UA6-RHR5]. The recent Justice for All Project grant also included inventory templates for courts and Access to Justice Commissions in its guidance materials. *Justice for All Project*, NAT'L CTR. FOR ST. CTS., www.nsc.org/jfap [https://perma.cc/NZ84-RVM4].

93. See generally U.S. DEP'T OF JUST., CIVIL RIGHTS DIV., LANGUAGE ACCESS ASSESSMENT AND PLANNING TOOL FOR FEDERALLY CONDUCTED AND FEDERALLY ASSISTED PROGRAMS (2011), http://www.lep.gov/resources/2011_Language_Access_Assessment_and_Planning_Tool.pdf [https://perma.cc/FDP7-26R5].

94. Matthew Kleiman, *Building a Better Understanding of Trial Courts*, 30 JUST. SYS. J. 321, 322 (2009); COURTOOLS, courtools.org [https://perma.cc/UF2P-4XTN]; see also John M. Greacen, *Backlog Performance Measurement—A Success Story in New Jersey*, 46 JUDGES J. 42 (2007).

95. ALAN W. HOUSEMAN & ELISA MINOFF, PUB. WELFARE FOUND., THE ANTI-POVERTY EFFECTS OF CIVIL LEGAL AID 3 (2014) (“there is little rigorous research that has actually attempted to document the effect of civil legal assistance on impoverished clients and communities.”).

96. D. James Greiner & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession 2* (Harv. L. Sch., Pub. L. & Legal Theory, Working Paper No. 16-06, 2016), <https://ssrn.com/abstract=2726614> [https://perma.cc/HGA5-

“no field can claim to be evidence-based without a central role for the [randomized control trial] RCT as a means of accumulating knowledge about what works and what does not.”⁹⁷ Randomized studies, while not widely recognized within the legal profession,⁹⁸ have been conducted on a range of topics, from legal aid providers and legal assistance, to incarceration and sentencing in criminal matters, to alternative dispute resolution.⁹⁹ Indeed, randomized studies are demonstrating what works and what does not in important ways: demonstrating, on the one hand, the effectiveness of drug courts and “swift, certain, and fair” probation,¹⁰⁰ versus the utter failure of “scared straight” juvenile delinquency prevention programs on the other.¹⁰¹

The need for rigorous evaluation permeates judicial

GHCT].

97. *Id.* This runs counter to advice given by ABA consultants. See ABA RESOURCE CTR. FOR ACCESS TO JUSTICE INITIATIVES, A FRAMEWORK FOR OUTCOME EVALUATIONS OF ACCESS TO JUSTICE COMMISSION PROJECTS 2 (2014), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_comm_outcome_evals_framework.authcheckdam.pdf [https://perma.cc/YB7D-BKE7] (“Many organizations shy away from outcome evaluations because of a mistaken concern that they require a standard of statistical rigor that makes them impractical or prohibitively expensive.”). *But see* Donald P. Green & Dane R. Thorley, *Field Experimentation and the Study of Law and Policy*, 10 ANN. REV. L. & SOC. SCI. 53 (2014).

98. Dalié Jiménez et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. POVERTY L. & POL’Y 449, 450 (2013) (“Although they have not yet gained widespread popularity in the evaluation of legal systems”)

99. Steven Eppler-Epstein, *Passion, Caution, and Evolution: The Legal Aid Movement and Empirical Studies of Legal Assistance*, 126 HARV. L. REV. F. 102 (2013); Steven Eppler-Epstein, *The Greiner Studies: Randomized Investigation of Legal Aid Outcomes*, 46 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 43 (2012); *see also* John Pollock, *Recent Studies Compare Full Representation to Limited Assistance in Eviction Cases*, 42 HOUSING L. BULL. 72 (2012); Greiner & Matthews, *supra* note 96 (citing Charles E. Ayres et al., *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U. L. REV. 67 (1963) (discussing bail and incarceration)); Jerry Goldman, *Experimentation with Justice: The Federal Judicial Center Report*, 1983 AM. B. FOUND. RES. J. 733–39 (1983) (discussing alternative dispute resolution); Melissa Labriola et al., *Do Batterer Programs Reduce Recidivism? Results From a Randomized Trial in the Bronx*, 25 JUST. Q. 252, 252–82 (2008) (discussing sentencing)).

100. Angela Hawken et al., *Hope II: A Followup Evaluation of Hawai’i’s HOPE Probation*, NAT’L INST. OF JUST. No. 249912, 69 (2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/249912.pdf> [https://perma.cc/ZW6S-BSLL].

101. ANTHONY PETROSINO ET AL., CAMPBELL SYSTEMATIC REVIEWS, SCARED STRAIGHT AND OTHER JUVENILE AWARENESS PROGRAMS FOR PREVENTING JUVENILE DELINQUENCY: A SYSTEMATIC REVIEW 5 (2013).

administration and court reform efforts. Even unification itself, the original court reform effort, is one for which the conventional wisdom of best practices is now being called into question.¹⁰² Evidence-based practices also call for learning lessons from other disciplines. Federal executive departments and agencies are encouraged to “strengthen agency relationships with the research community to better use empirical findings from the behavioral sciences.”¹⁰³ Similar initiatives are taking place at the state level, and expanding to include judicial administration in their scope.¹⁰⁴

Court systems do not have to build in-house capacity to tackle all of the various forms of research and evaluation. In addition to borrowing lessons from other fields, empirical legal analysis is growing in legal academia and extending beyond the realm of corporate law and corporate governance research, accompanied by the development of legal research institutes and Access to Justice Centers of various stripes on law school campuses.¹⁰⁵ Practitioners are also forging connections and networks between scholars and courts.¹⁰⁶ Research tools are not yet fully incorporated into the justice system, but the necessary ingredients are coming together.

102. Raftery, *supra* note 9, at 345 (“[A]ll three were predicated on the idea that courts would collect and publish data about their performance and that the performance would become better the more consolidated courts were, the more administrative control the chief justice had, or the more rule-making authority rested with the courts.”).

103. *Executive Order—Using Behavioral Science Insights to Better Serve the American People*, WHITE HOUSE: BRIEFING ROOM Sec. 1(a)(iv) (Sept. 15, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/15/executive-order-using-behavioral-science-insights-better-serve-american> [<https://perma.cc/2MKX-BWPA>].

104. *See, e.g.*, S.1690, 109th Sess. (Mass. 2017), <https://malegislature.gov/Bills/190/S1690>.

105. *E.g.*, *Center for Access to Justice*, GA. ST. U. C. OF L., <http://law.gsu.edu/center-access-justice/> (last visited Feb. 6, 2017); NAT’L CTR. FOR ACCESS TO JUST. AT FORDHAM L. SCH., <http://ncforaj.org/> [<https://perma.cc/2LBM-YCX7>]; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/> [<https://perma.cc/WU2K-XTPV>]; *Access to Justice Institute*, SEATTLE U. SCH. OF L., <https://law.seattleu.edu/centers-and-institutes/access-to-justice-institute> [<https://perma.cc/L745-XS5L>]; *Access to Justice Lab*, HARV. L. SCH., <https://clp.law.harvard.edu/clp-research/access-to-justice/> [<https://perma.cc/QSE6-Q8H6>].

106. Elizabeth Chambliss et al., *What We Know and Need to Know About the State of “Access to Justice” Research*, 67 S.C. L. REV. 193, 194 (2016); STATE JUSTICE INST., IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON RESPONSIBILITY, EMPOWERMENT, RESOLUTION, AND SATISFACTION WITH THE JUDICIARY: COMPARISON OF SELF-REPORTED OUTCOMES IN DISTRICT COURT CIVIL CASES (Apr. 2014), <http://www.courts.state.md.us/macro/pdfs/reports/impactadronddistrictcivilcases2014report.pdf> [<https://perma.cc/YMX6-N9SL>].

CONCLUSION

The advent of judicial administration and the expanding role of the court system have laid critical groundwork, but have not yet resulted in sweeping reform of the way that courts do business. At the same time, judicial leaders have assumed a stronger role in multi-stakeholder initiatives to improve access to justice in the civil court system. When those same leaders cast an eye inward, at their own operations, there is potential for dramatic change in the lives of court users. This will require culture change in both adjudicatory and administrative authority in the courts, and will mean implementing new initiatives that are both user-centered and evidence-based.