Designing the Courts to Truly Meet Users' Needs
Theory-of-Change Symposium
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Michael Buenger argues that the modern court system should – but does not – adequately meet the needs of actual and potential users of the courts. He recommends a "zero-based" approach to designing the courts as if we were starting from scratch. He is the Executive Vice-President / COO of the National Center for State Courts.

> "Most lawyers, even trial lawyers, don't get their problems solved in a courtroom. We like to go to court. It seems heroic to go to court. We think we're the new, great advocates, better than anything we've seen on TV, and we come home exhilarated by having gone to court."
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> - Attorney General Janet Reno

Our Outdated Court System

I recently saw a presentation where the speaker flashed up two slides. The first slide was entitled "Courts – 200 years ago." The second slide was entitled "Courts – Today." They were the same slide.

Visuals can be more jarring than words, and this presentation illustrated in 10 seconds what hundreds of academics, practitioners, and authors have tried to dissect in myriads of articles. For all the diversifying and new program developments that have occurred in the last half-century, our public dispute resolution system remains anchored in a binary approach that sees adversarial combat before a neutral and detached magistrate as the best method for seeking truth and justice and for resolving differences. All other forms of dispute resolution are classified as lesser alternatives.

Janet Reno's observation about lawyers and courts is accurate. The solutions to most disputes seldom are found in the courtroom. Indeed, the mere threat of the courtroom is often enough to solidify thinking towards some form of negotiated settlement. The problem, of course, is that far too often the settlement of the dispute occurs on the "courthouse steps" after much time, energy, and money has been spent teeing up a case for trial. Too frequently, the "courthouse steps" is used as a bludgeon.

Nevertheless, our public dispute resolution system is designed around that location as the beginning and end point for resolving disputes even though it is actually not used in most cases. It is akin to two competing cardiac doctors finally deciding that a less intense form of medical treatment is better just as the patient is being wheeled into the operating theatre for open heart surgery. Our procedures, routines, and thinking view

the great courtroom battle as the epitome of a proper dispute resolution process. It is the place where heroes are made or broken. Other approaches to resolving our disputes, though more commonly used, are somehow viewed as lesser in value, permanence, and effect.

The problem with this binary view on delivering justice services – what we might call the big "A" of the adversarial approach and the little "a" of supposedly lesser alternatives – is that it ignores the multi-dimensional nature of virtually all human conflict and the spectrum of services needed to resolve those conflicts. Our system presumes the "big A" approach will be needed in every matter (not just cases) even though all the evidence points to the fact that most cases ultimately are resolved under the "little a" approach. This partition between adversarial and "lesser" alternatives is neither necessary nor optimal.

Designing Courts to Meet Users' Needs

Our public justice system needs to move more rapidly to implement multi-dimensional approaches to dispute resolution. These approaches should be more accessible, affordable, and calibrated to achieve sustainable outcomes, not simply produce case outputs. Yet we have made the system far too procedurally complex for ordinary people to understand, much less access. The stark reality today is that many people in this country simply cannot afford – in time or money – to "go to court" as we have traditionally understood that concept. They certainly are not willing to constantly invest in a "courthouse steps" settlement approach. The result of this long commitment to the courthouse is that an entire private dispute resolution industry has emerged to challenge the monopoly once enjoyed by the courts. This new industry has designed itself around greater convenience, lower costs, and less acrimony.

It is incontestable that the expansion of multiple forms of dispute resolution over the last 60 years – some in the public space and some in the private space – has radically transformed many aspects of our justice system. Many courts today offer mediation and other services, either directly or through annexed services. Yet, notwithstanding these efforts, the issue that remains is whether all this intellectual investment and programmatic change has been transformative enough to meet the public's diversifying justice needs and expectations. I submit it has not.

To maintain both relevance and legitimacy, we need to remove the "A" in ADR. We need to move more rapidly and deliberately in understanding *what the public expects from* its justice system, not what we expect of the public when accessing that system.

Understanding the public's view of the system is critical now as a new generation of Americans take the stage with far different attitudes about their interactions with institutions, including the public justice system. In its most recent survey of public attitudes towards the state courts, the National Center for State Courts found that a majority of respondents continue to believe that too many judges do not understand the challenges facing people who appear in their courtrooms. By contrast, a majority of

respondents gave positive responses to questions concerning the need for expanding legal self-help systems and alternative access to the courts. Concepts such as legal check-ups, web-based access, self-help centers, and alternative service providers received positive public support ranging from 56% to 64%. Online dispute resolution (ODR) and the unbundling of legal services received overwhelming support. People increasingly prioritize costs, convenience, timeliness, and other values over traditional core concerns for fairness, objectivity, equal protection, or even due process.

It remains to be seen whether this shift in priorities reflects actual behavior or is merely defined by hypothetical perspectives. Due process may seem antiquated until it is your case under consideration. But the courts can no longer be the only justice forum, where swarms of lawyers battle one another in front of an umpire calling balls and strikes while the parties watch from the bleachers. Now there are other stadiums available.

Exponential Changes in Dispute Resolution

We know that things are changing rapidly. Futurist Ray Kurzweil, for example, observed, “Our intuition about the future is linear. But the reality of information technology is exponential, and that makes a profound difference. If I take 30 steps linearly, I get to 30. If I take 30 steps exponentially, I get to a billion.”

In the arena of dispute resolution, all signs point to significant changes in opportunities for resolving disputes – not linear changes but exponential changes. Technology is bringing new methods to bear with, for example, ODR (both for mediation and adversarial proceedings) becoming more widely available in the public and private space. Some systems “automate” the process with Augmented Intelligence (AI). Still others seek to “crowd source” justice by posting disputes online and asking the “public” to help resolve the matter. These are powerful indications that there is an element of dissatisfaction in our traditional public justice systems with all their procedural intensities and commitments to established practices.

There is, of course, a danger to all of this change. Mob rule seldom produces sound outcomes and AI may be good at pattern recognition but that is not the same thing as sound judgment. But unless we offer something better, we cannot be surprised when others step in to fill a vacuum with programs that may seem more appealing even if they do not achieve the ends of justice.

Principles in Zero-Based Court System Design

So how does a traditionally linear institution – suit-filed, case-submitted, judge-decided – confront exponential social change? It begins, I believe, with the singular notion of “zero-based thinking” by court leaders. This is no easy task for institutions that are so grounded in tradition, steadfastly committed to protecting core social and legal values, and charged with promoting uniformity and predictability.

Nevertheless, if we are to protect such important principles, we need to rethink from a zero-base what practices and programs are needed in the face of exponential change. The American justice system is not a creation from on high but rather a human institution formed and reformed over more than 300 years. Like all institutions – public and private – it is social construct designed around particular needs and defined by the challenges of the time and culture in which it works. Institutions are, therefore, capable of adaptation or collapse. We can confront and manage exponential change more effectively if we candidly answer this simple question: Knowing what I know today, would I design the system that I have?

It is a simple question, but the answer can be jarringly complex. As Dr. Donald Sull, a global expert on business strategy at MIT, has noted, leaders make commitments because making commitments is necessary to any endeavor – private or public. But, as Sull also notes, absent the willingness to constantly rethink institutional commitments, the commitments that initially provided the foundation for success "harden" over time and constrain the ability to respond to change. Staying committed to the commitments becomes the superseding value, not the intrinsic worth of the commitments themselves. Commitments can calcify and inhibit new thinking even in the face of stark evidence of monumental changes in the operating environment. And they leave institutions unable to make the needed adjustments. If we wouldn't choose the current system if we could start from scratch, it is time to rethink some of the fundamental commitments of the system.

So what could a new public system of justice look like? It would begin by acknowledging that there is a vital role for different forms of dispute resolution services within the public justice system, each designed around litigant needs, not institutional survival, or tradition, or heroic notions of great courtroom battles. We know, for example, that as a general principle adversarial combat produces neither the truth nor a satisfying outcome in certain types of cases. Getting warring parents in a courtroom to battle out their differences seldom dampens grievances or produces healthy, sustainable outcomes. Some case types need to be viewed through a different lens of dispute resolution – a lens that directs the case towards more facilitated results that the parties can embrace.

An improved system would be simpler in design and accessibility. The American judicial system has its origins in three centuries of practice and tradition. From its inception and throughout most of its history, the system has remained largely unchanged, committed to the court as the preeminent dispute resolver, wrapped in increasingly intense procedural structures designed to channel conflicts towards the courtroom. As the late Frank E.A. Sanders observed years ago, "We have tended to assume that the courts are the natural and obvious – and only – dispute resolvers." When that is the case, the default setting for court as resolver is the adversarial battle in the courtroom. This has been, if you will, the "commitment." But, as Sull noted, long-engrained commitments harden over time even when they might not make sense in an emerging environment.

While there have been some changes in the public justice system, it remains largely framed around the notion of fully-represented parties operating in a procedurally intense structure designed to channel conflict to an adversarial output of winners and losers. Yet, with increasing regularity, many people appearing at courthouses are not represented by attorneys, do not understand the complex procedures, and are more interested in resolving a problem than furthering a conflict.

To be clear, procedure is important when it is grounded in protecting core values such as due process, access to justice, fairness, objectivity, and equal protection. But when such values are superseded by dogmas undergirded by vast unintelligible procedures, we have lost most of the public. Our intensely procedure-based system should be re-examined with an eye towards great clarity, simplicity, and accessibility to multiple mechanisms of dispute resolution. Knowing what we know today about the needs of the public, should we maintain our commitment to such complexity?

In tandem with answering the complexity question, a reframed system would provide programs that are scaled and scalable, built on a foundation of triage where litigants' needs are assessed early on and matters – not just cases – are directed towards a resolution process tailored more specifically to the underlying dispute.

It would migrate away from the notion of courthouse and towards the institutionalization of "justice centers." The great jurist Oliver Wendell Holmes once thundered at a young lawyer, "This is a court of law not a court of justice." Most people come to the courthouse seeking justice not law. The pursuit of justice often requires more nimble understandings of human conflict and dispute resolution than a court of law as Holmes would understand that terminology.

Finally, such a system would recognize the continuing need for agility by elevating all forms of dispute resolution to quasi-equal status within the umbrella of the public justice system. We would no longer talk about the "big A" approach and the "little a" approach to dispute resolution. A commitment to institutional agility ignores this distinction and encourages an intellectual investment in new approaches to dispute resolution. This would enable the system to handle all manner of disputes, or, if lacking that capability, have the willingness to refer matters to others with innovative programs and expertise. It would recognize that, for dispute resolution to be effective, a public-private partnership is needed because only a court can speak with finality but getting to that point may not always be necessary. In the end, some disputes ultimately do need someone to make a final judgment because the parties cannot work out their differences. This should not, however, be the first step. It should be the last.

The questions that we are being forced to confront are: Knowing what we know, would we design the system we have? Should we remain vested in certain commitments constructed over 300 years?

To some degree, we have begun to answer the questions as seen in the incremental changes that are occurring. This does not, however, have to be a throw-the-baby-out

with-the-bathwater moment. There are principles and traditions worth protecting because they continue to make sense.

Yet, in our quest to answer zero-based questions, we should heed one of Sull's other cautions. When we should look deeply into the core of the issues, we should not engage in "active inertia" by thinking that we are doing something sweeping when we make changes only "on the edges" that essentially perpetuate an outdated system.

It is important to answer fundamental questions about our dispute resolution system in a systematic and penetrating fashion so that it will diversify in a manner than satisfies people's real needs for justice and dispute resolution, protects their fundamental rights, produces sustainable outcomes, fosters a predictable legal system, and promotes social stability.