Overview

Let's begin this overview with a vision of a court process in the twenty-first century.

Vision of the New Court Process

Imagine that you are a potential litigant with a legal problem. You think you want and need a legal decision from a court, but you are not sure. To begin the process, you navigate online to the litigant portal for your jurisdiction. That portal is maintained by a group of legal services organizations, including the courts. Much like TurboTax, the portal asks you a series of simple questions to determine the type of legal dispute. On the basis of your answers, it advises you to either drop the case or to proceed with one of several possible organizations and processes.

If the advice is to proceed with a court case, the portal interacts with you further to solicit additional information about you and your case. On the basis of that information, it advises you regarding your need for a lawyer. If you do not need a lawyer or cannot afford one, the portal suggests the most appropriate and cost-effective form of assistance and provides access to information about that channel of assistance. If you decide to follow that advice and give your permission, the pertinent subset of already-collected information is forwarded to that organization.

Of course, you are free to ignore any of the advice given by the portal. If you choose a different course, the portal still provides any necessary support that it can. Note also that you may not be aware of the portal and instead begin the process by visiting a court, lawyer, or legal services provider either physically or virtually. Any of those organizations may choose to direct you to the portal for evaluation and advice or, alternately, perform a separate assessment and only then make the referral (or not). Thus, there is freedom of decision on both sides.

Let us assume that you decide to proceed with the case through the court system.

The portal next passes you to the case-filing interface, which helps you create and file the initial documents for the case electronically. Again, as with TurboTax, you do not need to figure out which forms are necessary or understand the forms themselves. The portal interface guides you through the process, solicits the necessary information, creates the forms, and files them with the court. If fees are necessary, the portal solicits and collects those as well.

The portal then advises you on the overall process and the next steps. If you have registered with the portal (and indirectly with the court in this case), it receives e-mail notifications and reminders as required to keep the case moving by scheduling hearings and completing necessary actions. What happens next depends partly on you as the litigant, partly on the case characteristics, and partly on the opposing party.

One of the things the portal does is provide you with market information about the case: what the typical costs and times to litigate are and what the typical outcomes are for similar cases. Especially with civil cases, you may have the opportunity to choose between tracks with more or less due process, more or less cost, more or less complexity, and more or less time to disposition. You can then choose which track you prefer.

Let us flip over to the court side of the process now to get a sense of how this new approach is different from what courts currently do. The portal transacts the filing with the court, kicking off internal processes. In addition to the traditional filings, the information collected by the portal is now used by the court to assess what needs to be done with the case and what assistance, if any, needs to be provided to you, the litigant. Let us start with the latter first.

If you have a lawyer, the court may provide no assistance beyond

the usual electronic notifications and reminders to you and your attorney. If you want to get a lawyer, the portal separately provides search and screening services for doing so. If you lack a lawyer, the court may still do nothing special if you are assessed to be capable of handling the case yourself. Even in this situation, it may send you messages pointing to information or services that you can use to better prepare your case.

Alternatively, it may determine that you require more direct assistance, which could take the form of a referral to a court self-help center, an appointment with court legal staff, a slot in a court-training session, or a referral to a legal-aid organization. As the portal learns more about you and your case, the court may perform reassessments and change the assistance provided accordingly.

The court uses information from the portal about the case characteristics to select the appropriate initial channel for case management. If you have already indicated through the portal a preference for the case track, the court initially honors that request, although it may separately assess whether your chosen track is appropriate. If it disagrees with your choice, it may indicate so, but the choice is still under your control.

Within the court, the case is automatically assigned to somebody for the next processing step. We describe it this way because who that person is varies dramatically according to the type and status of the case. This is the step where it starts to get interesting.

Several commentators have recently suggested that this revolution in the legal services industry is a good thing, even though it will probably cost the bar jobs and revenue from low-skill tasks that others now perform. Why is that? The answer is that lawyers now spend much more of their time performing high-skill tasks, which is, after all, what they were trained to do. There may be fewer attorneys, but their jobs are more interesting *and* more lucrative. One pundit termed this phenomenon "practicing at the top of their license."

A similar trend occurred over several decades with health care and doctors. Doctors used to see all patients for all types of maladies. Now services are unbundled in two ways. First, limited health care services are provided in a wide variety of local walk-in clinics—some are even available in drugstores—where no appointment or prior relationship is required. Patients can schedule same-day appointments, get test results, or request a prescription, all on their smartphones.[1] This change

broke the old model, where patients had to see family doctors or specialists by appointment and hospitals did everything else.

Patients now often see a doctor only after going through a series of encounters with medical staff having progressively more training and capability. They may start with a physician's assistant and then be handed off to a nurse practitioner before seeing a doctor. As a result, doctors also end up practicing more of the time at the top of their licenses. The court system needs to take a similar approach.

Imagine now that a clerk initially screens a new case. Because clerks have no legal training at all, they are empowered only to make an explicit set of decisions on the basis of explicit, predetermined criteria. A case manager, also not likely to be legally trained, may also make decisions about the most appropriate case-management channel and the appropriate next significant event in each case. These decisions are based on a protocol that everyone clearly understands and that the bench has approved.

While these two roles shield other members of the court from performing low-skill tasks and ensure efficient and appropriate initial case processing, they do not really touch the heart of radical triage measures proposed in this book. For that, we must elevate the case to paralegals or staff attorneys.

Staff lawyers have two main tasks to perform. First, they play a starring role in several of the early case-triage models discussed. These are sessions where case issues are evaluated and the cases are disposed of if no contested issues are involved or if the litigants are able to resolve their differences themselves. Alternately, the staff lawyer may find that several issues really are contested or that the issues are serious enough to require the appropriate due process. The case then gets scheduled for the next significant event. Thus, cases that move forward deserve to do so, and the court's scarce resources are conserved for the highest purposes.

Perhaps the most fundamental change in how courts triage incoming cases is the step away from simple rules based on case types. Rather than placing cases within case types on different tracks, our approach to case triage places them in different case-processing tracks regardless of case type. As these cases evolve, they may shift to different tracks as the needs of the case issues dictate. The two keys to these decisions are (1) what kind of case-management strategy does the litigant want and (2) what is the status of the issues in the case?

Litigant preferences drive the choice made between the adversarial and dispositional processes. Given appropriate market information, litigants can decide in civil and family cases between heavy or light due process. That decision carries with it significant differences in process complexity, cost, and time to disposition. In some cases, the court may force use of the adversarial process for social reasons, such as in cases with so-called high stakes: potential loss of liberty, loss of housing, unequal power, and so forth.

In theory, litigants might also affect the choice between adversarial and problem-solving processes. In some criminal cases, the offender might go either way and now has some choice. In some family cases, the parties might disagree with the court about whether a specific case should be handled in an adversarial or nonadversarial way. The wishes of the litigants matter when making these judgment calls.

Some civil and family cases now use the courts solely to provide legal records of the decisions because they are forced to do so. These are matters that could be handled administratively by either the court or some other organization. Many courts are moving to convert citations to payables that are handled only administratively as well. Some case types, such as labor-law cases, in some jurisdictions could be shifted to administrative law courts in the executive branch.

Case issues are the second driving factor in decisions about case triage. The person in charge of the initial review may find that the case literally has nothing at contest. If so, it should be disposed immediately. Presumably, a well-designed litigant portal would prevent most of these cases from reaching the court. Some cases may include one or more issues at contest, but they could be assessed to be easily resolved without requiring a judge by using one of several possible practices. Finally, some issues are real and substantive. The decision then would be to place them before a judge as soon as possible and queue them for trial as required.

Nothing is immutable about case issues. Cases evolve, as do the underlying problems and situations of litigants. New issues may come up. Old issues may ameliorate or become more toxic. Periodic case reviews by competent court staff are needed to confirm that cases remain on the most appropriate processing tracks. Offenders who fail out of problem-solving treatment programs frequently need such reassessments. Another would be juvenile delinquency cases that turn into adult criminal offenses.

Note that all these practices remove low-level tasks from the judge. As the scarcest of all court resources, judges should spend as much time as possible working on the most complex legal tasks. Aside from making the courts more efficient and the judges more productive, this revised process also provides litigants with faster and better service for the most serious cases. Equally important, it makes the job more rewarding for judges and increases the attraction of being a judge for talented potential candidates.

This then is the vision of the modern court: every legal problem does *not* require a court solution. Courts can improve what they now do well and can become even more cost-effective for citizens. In short, the modern court can continue to perform its mission well in an era of permanently constrained resources.

Courts as though Litigants Mattered

Courts have always been a peculiar American institution. For the first 175 years, the judicial system was a separate branch of government in legal name only. Then state court systems realized their potential as a full partner in the governmental monopoly. Now their role in society has grown to encompass not only traditional court business but decisions made by social agencies as well.

The past sixty years have witnessed the transformation of courts from narrow adversarial forums into broad general markets for legal decisions. The transformation has occurred not in a planned, orderly fashion, but very much in an ad hoc way. Although not all judges and court administrators have been happy about this situation, courts floated along until the Great Recession forced a serious reexamination. Now the institutional mission of the courts is very much under attack in many states, and courts must respond in some way to survive.

What caused all these changes? It is frequently noted that courts are conservative organizations, so they rarely change unless they are forced to do so. For the purposes of this book, the modern era of courts in America began in the 1960s. A wave of U.S. Supreme Court decisions on criminal procedural justice radically increased the cost of criminal prosecutions. At the same time, a crime wave unparalleled in modern times motivated politicians, including local prosecutors, to start putting record numbers of citizens in jail or prison.

Court caseloads increased significantly, and case backlogs grew accordingly. Criminal cases crowded out civil dockets because of speedy-trial rules, so all case types started seeing large delays. The reaction of courts to this crisis radically changed them in two ways. First, courts started acting like a real organizational branch of government complete, with their own administrative budgets and staff. The definition of judicial independence was broadened from the previous protection of legal decisions to include administrative independence—the ability of courts to control their own organizational destinies.

The war on drugs and other crimes, also launched in the 1960s in reaction to growing drug use, increased the demand for court services. Soon, more offenders were convicted for drug offenses than had recently been sent to prison for all other crimes. Trial rates for both criminal and civil cases started a long, slow decline as criminal caseloads exceeded the trial capacity of courts, and prosecutors used new weapons to reach settlements with guilty pleas in record numbers. A majority of the felonies were low-level drug cases, and most of the defendants routinely pled out before trial.

Within a few decades, trials became rare events in most courts. Since trials are the single-most resource-intensive event in a court, holding fewer of them contributed to improving court efficiency in disposing of cases.

During the same time period, some courts acquired new, non-case-related functions, such as pretrial and probation services, alternative dispute resolution services, indigent defense, and supervision of guardians, conservators, and guardians *ad litem*. From the perspective of many judges and court administrators, key functions of the criminal justice system would be lost if courts did not step up. From a national perspective, these additions to court functions were patchy and inconsistent because they, too, were acquired during periodic budget crises, creating a surprising disparity in the scope of court missions across jurisdictions.

The Court Response

Around 1990, it also became clear that the war on drugs was not working and that states would not be able to afford the required prisons for much longer. The inevitable backlash spawned a wave of new "problem-solving" courts to treat offenders with drug-addiction problems.

Special driving-while-impaired (DWI) and mental-health courts soon followed. These new types of dockets were institutionally revolutionary in the sense that they were expected to solve social problems using nonadversarial methods.

Problem-solving courts had a precedent. Juvenile courts were conceived as the original problem-solving courts. Even though the pendulum has swung between treating juveniles as children under the protection of the court and making young adults subject to criminal procedures and due-process protections, delinquency courts especially are still viewed as places to reform children—not to punish them. Once delinquency courts set the precedent of a social mission, courts quickly acquired responsibility for solving a second set of social issues involving children. Dockets for dependency and such status issues as truancy were followed by "unified family courts" that appeared and operated with similar nonadversarial sets of procedures. The explicit goal of these courts was not to decide guilt or innocence but to diagnose the problem(s) that brought children to court and to find solutions. Courts quickly learned that both types of new problem-solving courts were very resource-intensive, putting further pressure on court budgets.

Second, a profession of court administration arose, including a comprehensive canon of definitive works on best practices. For the first generation of professional court administrators, the primary goal was a reduction in case backlogs using classic caseflow management techniques, which were also relatively crude. Within case types, two or three tracks were created according to estimates of case complexity. Some attention was also devoted to early disposition of less-complex cases.

The first workload/staffing studies soon appeared to buttress better case management with justifications for additional judges and staff where needed. These studies implicitly assumed that current business processes and practices were ideal and took at face value the reported time allocations of judges and staff. Not surprisingly, courts almost always needed more resources.

As each new wave of court workloads arrived, courts responded by evolving practices that made them more efficient. It was not only trial rates that decreased—average trial times and case-disposition times did as well. To the traditional case tracking that caseflow management recommended, courts added a special emphasis on achieving quick

dispositions through a number of techniques, mostly focusing on early interventions and a variety of arbitration and mediation programs. As with calendaring systems, studies found inconsistent results for most of the new programs, and best practices were hard to identify.

These innovations cumulatively enabled courts to handle higher caseloads per judge and staff than was previously possible. However, it was not clear whether the new practices were responsible for the increases or whether judges and staff were simply working harder than in the past. Rumbles about the quality of justice started to reverberate in the background as personnel complained of "burnout."

Ironically, everyone knew that quality was not the primary goal in a monopoly like the courts. Where else could litigants go? The real goal was to clear the dockets by using judges in the most efficient manner. Judges were, and are, the most expensive and scarce type of court resource. If the courts could keep the local bar happy while accommodating judges, so much the better. Courts viewed themselves as having no control over the demand for court services, so litigants were just a fact of life, not customers to be satisfied. Judges were the true evaluators of quality.

Financial Problems

Recessions in 1980, 1990, and 2000 periodically put the entire criminal justice system under short-term fiscal pressure. Fortunately, these recessions always ended quickly, so courts were able to weather the storms using mitigations that left the system essentially unchanged. When the business cycle and government revenues recovered, courts would make up lost ground and restore previous levels of staff.

Then in 2007 the Great Recession arrived, and courts reacted as they always did when recessions occurred: they put in place a wide range of short-term measures designed to wait out what had always been short budget downturns. Such policies as position and wage freezes, delays in calendars, shorter business hours, and furloughs can be used for only a brief period without reducing both the quality of service and the quality of justice. Thus, courts were stunned when the recession grew more severe and persisted for several years.

Their traditional mitigations to budget crises were becoming untenable. As the short-term coping measures remained in effect, the ability of the courts to carry out their constitutional mission was

threatened. In response, some courts prioritized case types and stopped processing those deemed to be of lowest importance. Others attempted to reengineer their business processes—with partial success. Still others began to question whether all the functions they were carrying out should be within the scope of their operations.

Nationally, courts quickly united around three strategies. The first (and very traditional) approach was to claim a special budget status for courts as the third branch of government. In this scenario, the judiciary must be funded at a level that enables it to carry out its constitutionally mandated mission and functions. Thus, unlike those of executive branch agencies, its budget cannot be cut as part of general, across-the-board budget reductions. Needless to say, this strategy rarely worked.

Second, the courts considered several simple ways of guaranteeing their "fair share" of existing state and local government revenues. A favorite idea was fixing the court budget as a percentage of the state general fund, with the most frequent number being 3 percent. Because court budgetary needs varied widely from jurisdiction to jurisdiction by court structure and mission scope, a set proportion of the general fund bore no reasonable relation to the actual amounts needed. Therefore, legislatures rightly refused to support such initiatives.

The third and most promising strategy was to review what really belonged within each court's core mission. These "essential functions" were often specified by analyzing the state constitution and existing statutes. What most courts quickly discovered was that those sources of legitimacy supported only the narrow definition of court work—the classic adversarial mission. While some judges liked the idea of returning to the traditional and more comfortable role of courts, many others were appalled. What would happen to all the new cases that required problem solving?

Oddly enough, the least-used method of responding to the budget crisis was traditional caseflow management. Although nothing substantially new had been added to the literature since the 1970s, courts acted as though they had already mined all its nuggets for improving business processes. In fact, most courts were not using proper caseflow management to its fullest extent, and the institutionalization of such practices remained a huge problem. Courts needed two things: a normative way to define their essential functions and a methodology for estimating an adequate budget for those functions. The courts also

needed new and improved practices for managing the cases within the scope of those functions beyond classic caseflow management. Fortunately, a number of courts were experimenting with such new practices in bits and pieces, but a more systemic approach was lacking.

The starting point for defining the mission of a modern court must be the recognition that courts have customers: the litigants and the public. Courts must take this view for the first time because they no longer hold a monopoly on the market for legal decisions. As cases were delayed too long, being decided by judges lacking appropriate expertise, or costing too much, litigants began turning to alternate means of settling their legal disputes.

This problem grew especially evident with civil cases. Large complex cases involving corporations increasingly moved to private arbitration. The advent of business courts did not stem the tide in most places. The continuing bar monopoly on legal services and the legal community's resistance to unbundling those services exacerbated a large and growing wave of unmet civil legal needs not found in any other developed country. Faced with unaffordable attorney costs, those litigants who did go to court tried to represent themselves in record numbers. The latter trend quickly spread to family-law cases as well.

The advent of self-represented litigants brought with it a double whammy for the courts. Because litigants and courts were ill prepared for cases to be handled without lawyers, the workload problem grew even worse. Even more alarming, litigants simply lost their cases needlessly in such areas as foreclosure, eviction, and dependency because they often defaulted rather than try to negotiate. Then the wave of judge-intensive problem-solving courts added yet more judicial work, further splitting some benches as to the legitimacy of such courts.

The last cruel twist of fate for the courts came when the Great Recession supposedly ended with an upturn in the business cycle. It took four years instead of one and a half, but revenues finally did bottom out and start growing in most jurisdictions. For states with energy resources or large agriculture subsidies, the recession never did cause much pain. For states with decentralized systems funded by local jurisdictions with adequate tax sources, the fiscal problems were also minimized. For everyone else, budgets were down about 20 percent from their previous high point.

The false dawn of budget recovery resulted from fundamental changes in demographic structure and the ravenous hunger of health

care and pensions. As a result, courts are unlikely to escape continuous pressure on their resources for the next couple of decades at least. Court budgets have a "new normal." Faced with this future, courts simply must address the twin issues of mission scope, or essential functions, and improved case management.

Remedies

We argue in this book that courts should respond in three specific ways to the ongoing crisis. First, they must fundamentally reorganize their business processes around the concept of the litigant as a customer. Second, they must identify what their essential functions are on normative grounds and devote their scarce resources to only those areas. Third, they must universally adopt new and radical approaches to case management centered on concepts of case triage. Together, these recommendations offer a new vision of the courts and their modern mission.

Most courts still operate like single-artisan establishments. Much like the way the textile industry was organized three hundred years ago before mechanization and the advent of factories, individual judges operate legal-decision businesses as they wish, with some more centralized support. Business processes and legal quality vary widely within and between individual jurisdictions and even between cases. The public deserves better.

Doctors used to operate this way as well, but they were forced to adopt more consistent and evidence-based practices to the benefit of their customers. Judges and courts need to do the same. Consistent best practices for case processing will significantly improve courts and the legal experience for litigants. The flood of self-represented litigants has already forced courts partway down this path. Some court processes are at least described online, and some court services are also available electronically.

Much more needs to be done with court processes. The current guidance on court case-management systems describes only desired functions at a relatively high level.[2] Courts are still free to implement widely varying processes for carrying out those functions, and the result is expensive and fragile systems software that is hard to change when business requirements demand it. In a separate initiative, the National Center for State Courts (NCSC) plans to identify and docu-

ment the necessary business capabilities and processes over the next several years.

A fundamental starting point for better business processes is good management information. Toward that end, NCSC established ten national performance measures, called CourTools.[3] In addition, NCSC published an approach for using those performance measures to better manage courts. The so-called High Performance Court Framework starts from the fundamental belief that citizens are the real customers of the courts and should be treated that way.[4] The Framework then lays out a systematic approach to assessing court performance and fixing business problems.

The issue of which court functions are essential is a vexing one. On the one hand, courts do not want essential justice functions to fall through the cracks. On the other hand, they are not well positioned to carry out a number of nontraditional functions. We argue that there are good reasons for reassigning some functions to the executive branch or even outside the legal system entirely. We also provide some guidance on when courts should or should not make these changes.

Aside from the essential functions, it may be worth asking to what extent courts should support the resolution of legal problems outside the formal legal system. The United States is unique in its preference for resolving all legal disputes in the courts. In contrast, many other developed countries have policies that encourage litigants to resolve their legal problems, whenever possible, using more informal processes. While intriguing, that issue lies outside the scope of what we consider in this book.

Most of this book focuses on the third mitigation strategy: case triage. We argue that individual case statuses must be taken much more seriously, since key triage decisions should be based on such information. Courts should not take the route of treating most cases in a certain case type like similar pieces of bread. We further argue that the type of case processing matters more than anything else and should be clearly understood and chosen at all times. Cases in the same case type may require different types of case processing. The same case may even require different types of case processing over its life as its status changes.

Proper case triage requires courts to have a level of detail about individual case statuses immediately available in a way that almost no court does now. Because case-management systems were developed

first as docketing systems for clerks and then as case-management approaches based on crude case-type rules, they lack legal detail. Judges and other court staff must read the actual documents and make assessments to access the required information. Needless to say, that requirement makes it too inefficient and expensive to implement a real case-triage approach.

Because these recommended changes in court organization and administration are so radical, we indicate for each type of case processing which specific resources are required and which business processes should be used. We also describe the projected impacts on judges, staff, and facilities. On the basis of that information, a court could reorganize itself to implement case triage with the help of some new functionality in the standard case-management systems.

Our recommendations for case triage are not just academic concepts. Most, if not all, of them have been implemented individually by one or more courts with some success. Many of them are recognized as good practices by many courts, even if they are not widely implemented. Most courts also now realize the need for better management and improved business processes but find it extremely hard to make the desired changes under their current governance structures. Again, NCSC has published useful guidelines on how to solve that problem.[5]

The ideas in this book, together with the other supporting concepts being worked on by NCSC, will bring the courts into the modern world. Many of these ideas would have been immediately recognized in an introductory business management course twenty years ago as obvious actions to take. Although the courts are conservative by nature and design, they can no longer afford the luxury of using that excuse to avoid change. If the courts wish to provide quality justice at a reasonable price to their customers in the future and remain a viable social institution, then they must make these significant reforms soon.

Plan of This Book

Part I of this book contains two chapters outlining the current situation with respect to court reform. Chapter 1 expands on the arguments made in the overview, especially that courts are a victim of their own success. Because courts are among the most respected of government agencies, many disputes now come to court that once were resolved either informally in the family or community or by other governmental

agencies using an essentially administrative process. Chapter 2 empirically examines what state courts actually do, thus clarifying the mismatch between our perception of courts and their actual workloads.

Part II contains six chapters outlining our proposals for reform. Chapter 3 suggests the need for triaging cases into explicit case-processing categories, each following a separate resolution process. Courts were originally synonymous with the adversary process—the most costly and slowest form of court decision making. As the types of cases requiring resolution grew, issues inappropriate for resolution by the adversary process came into court, and the adversary process was transformed over time to adapt to changing conditions and meet changing expectations. This transformation, however, was not done systematically or perhaps even consciously but evolved in different forms in different locations. This section suggests that court processes be explicitly and deliberately divided into four methods of dispute resolution and outline criteria by which the triage should take place. A separate chapter describes each process, the types of cases most suitable for resolution by each process, and the ways each process can be optimized to deliver significantly improved services to the public. Because of the recent controversy over use of specialized problem-solving courts, a separate chapter defines and illustrates the problem-solving approach and another describes the consequences of this approach for the justice system as a whole. Each process needs to be recognized and redefined for what it is so that efficiencies can be achieved in each process, as opposed to expecting reform of the basic adversarial process to cover all four processes. Also, each case-processing method places different requirements on the judge and therefore has caused the judge's role to evolve.

Part III consists of two chapters. Chapter 9 brings our theory together with suggestions for redesign by showing examples of courts successfully using some of the recommended practices, thus demonstrating how the reforms advocated here can be accomplished in practice. Chapter 10 complements the overview in that it describes a vision of the modern court as well as some of the barriers to implementation.