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Access to Justice: A Broader Perspective

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There are many ways to conceptualize what it means to have access to justice in the California courts, and the degree to which Californians are able to access justice meaningfully does not rest on any one aspect of the judicial branch. Confronting the myriad of issues affecting access to justice in California requires a comprehensive and long-term strategy. The dialogue concerning access to justice needs to be broader and more inclusive instead of merely concentrating on short-term crises and budget dilemmas. A shift away from episodic, reactive responses to short-term challenges, and a move towards a more comprehensive, multidimensional view of access to justice could meaningfully address the underlying structural barriers that prevent many Californians from accessing justice. By rethinking the structural and organizational underpinnings of access to justice, the judicial branch—with the support of the legal community and the other political branches—can promote additional long-term reforms that enhance the independence and accountability of the judiciary and ultimately improve the openness of California courts.

I. INTRODUCTION

A separate and independent judiciary is one of the cornerstones of our system of democratic government, but in order to ensure the rights of the people, justice must be accessible. There are many ways to conceptualize what it means to have access to justice in the California courts, and the degree to which Californians are able to

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access justice meaningfully does not rest on any one aspect of the judicial branch. Rather, access is determined by a host of interrelated factors that collectively shape and determine the openness of the California courts.[1] At the most fundamental level, access may concern the availability of judges, court facilities, and court personnel. Access can also relate to the degree and ease with which citizens obtain legal services. Other factors affecting access to justice are more elusive, such as the courts' atmosphere and user-friendliness, the impartiality of the courts, and the public's trust and confidence in the courts.

Recently, much attention has been given to California's budget crisis and the effects of budget cuts on access to justice. The magnitude of the budget shortfall has triggered a crisis response by California government, including a decision by the courts to close one day every month as a cost-saving measure. Periodic economic downturns, and the resulting short-term fiscal inadequacies and crisis responses, are important realities in considering access to justice. However, focusing exclusively on episodic budgetary challenges creates a framework far too narrow to meaningfully address the range of issues affecting access to justice.

This Article argues that the dialogue concerning access to justice needs to be broader and more inclusive instead of merely concentrating on short-term crises and budget dilemmas. There needs to be a shift away from episodic, reactive responses to short-term challenges, moving towards a more comprehensive, multidimensional view of access to justice that meaningfully addresses the underlying structural barriers that prevent many Californians from accessing justice. In some cases, efforts to address short-term crises have even created new barriers. A more systemic and inclusive approach is needed to break from the cycle of reactionary short-term reform.

Such a shift in thinking about a broader approach to access to justice raises important questions. One major inquiry concerns the role and capability of California's other two branches of government in working with the judiciary to address institutional limits on access

1. We use the term "openness" here as a deliberate nod to the thirty-nine state constitutions that provide, in a variety of formulations, for "open courts" as a constitutional imperative. *See* Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1005 n.1 (2001).

to justice. While the judiciary must remain politically independent of the other branches, particularly with respect to its impartiality in decision making, it is unable to functionally stand alone. Most notably, the state courts depend on the governor and legislature to support certain programs and initiatives through laws and funding. California's spiraling budget crisis exacerbates this inherent tension; deep funding cuts endanger the judiciary's capacity to perform its core decision making and operational functions, which raises fundamental separation of powers questions. The Judicial Council of California[2] is trying to reconcile its mission—improving the quality of and advancing "the consistent, independent, impartial, and accessible administration of justice"[3]—with significant and chronic budget deficiencies imposed by the legislative and executive branches. The courts will not achieve the Judicial Council's priorities without adequate and stable resources.

The foregoing begs the question, how can the judiciary work with the other two branches to enhance access to justice while at the same time preserving our tripartite system of checks and balances and safeguarding the independence of the judicial branch? It is both appropriate and necessary for the courts to work with the legislature and governor to improve crucial programs, such as court-interpreter services or assistance for self-represented litigants. But some scholars and policy makers argue that judicial branch representatives (such as the Chief Justice and the Administrative Director of the Courts) should act further by aggressively engaging the legislature and the governor and lobbying key officials to achieve the judicial branch's legislative agenda.[4] Essentially, it is argued that the

2. "The Judicial Council of California is the policymaking body of the California courts, the largest court system in the nation. Under the leadership of the Chief Justice and in accordance with article VI, section 6 of the California Constitution," the Judicial Council is responsible for ensuring the "consistent, independent, impartial, and accessible administration of justice." JUDICIAL COUNCIL OF CALIFORNIA, JUSTICE IN FOCUS: THE STRATEGIC PLAN FOR CALIFORNIA'S JUDICIAL BRANCH 2006–2012, at 4 (2007), *available at* http://www.courtinfo.ca.gov/reference/documents/strategic_plan_2006-2012-full.pdf. Article VI, section 6 also establishes the position of Administrative Director of the Courts to "perform functions delegated by the Council or the Chief Justice." CAL. CONST. art. VI, § 6. The Administrative Office of the Courts (AOC) was created by the Judicial Council to carry out the Council's official actions and to ensure leadership and excellence in court administration. CAL. R. OF CT. 10.1(e).

3. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 2, at 8.

4. *See generally* James W. Douglas & Roger E. Hartley, *Making the Case for Court Funding: The Important Role of Lobbying*, JUDGES' J., Summer 2004, at 35, 36.

judiciary needs to play the political game better.[5] Some even suggest retaining professional lobbying firms to advocate on behalf of the judiciary.[6] When played to its fullest, the political game can entail using political leverage to the judiciary's advantage, playing partisan favorites, understanding and taking advantage of the role of contributions, and even taking steps that approach more direct, quid pro quo politics—trading action on one issue for action on another issue.

Though such a strategy may yield short-term gains in the form of larger appropriations or swifter enactment of judiciary-sponsored bills, it ultimately may prove self-defeating. As the judiciary delves deeper and deeper into legislative and executive branch politics, moving beyond mere educational advocacy on the merits of issues, it becomes more vulnerable to partisan and interest-group manipulation. Consequently, it also becomes vulnerable to the loss of public trust and confidence. More aggressive political engagement, therefore, is not a viable long-term strategy for improving access to justice.

Other commentators suggest that the judicial branch needs to improve its existing relationships with the political branches.[7] For example, increased communication, education, and coordination among the branches will help the judiciary work with the legislature and governor to enhance access to justice.[8] Although improving inter-branch relations is a crucial component of any effort to enhance access to justice, it is not a sufficient strategy for addressing the full range of access challenges the California courts face.

This Article suggests a different approach. Confronting the myriad of issues affecting access to justice in California requires a strategy that is more comprehensive and long-term than either political lobbying or improved inter-branch relations. As part of this new strategy, we must first acknowledge and address the long-

5. *Id.*

6. *Id.*

7. Roger E. Hartley, *Intergovernmental Relations and the Courts: How Does an Independent Branch Play Politics?* (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428537.

8. *Id.*

standing institutional and structural factors underlying today's barriers to justice.[9]

We also advocate not merely improved inter-branch relations, but rather a rethinking of the judicial branch's relationships and interactions with the legislative and executive branches. The California judicial branch enjoys strong partnerships with the political branches, and can and should seek to build on this foundation of mutual cooperation to improve inter-branch dialogue. However, in an effort to move beyond just improving the judiciary's existing relationships with the political branches, we encourage judicial leaders and policy makers to reevaluate the basis of these relationships. Most notably, branch leaders should have a candid discussion about inter-branch accountability that is not limited to just "checkbook accountability." Promoting education about the judiciary, reducing inefficiencies through performance management and budgeting, and developing public feedback mechanisms to enhance judicial credibility are just a handful of strategies on which the judicial branch can and should focus to improve branch openness. Approaching checks and balances from a different perspective reveals promising new avenues for collectively enhancing access to justice and judicial accountability.

Finally, we call on other important stakeholders, such as law schools, bar associations, lawyers, academics, and law students, to reexamine their roles in enhancing access to justice. The legal community can act as the judiciary's political voice within the political branches. An effective legal community can help promote and defend the judiciary's interests in the legislative and executive branches, while avoiding the partisan risks involved with political engagement. Further engagement by judicial branch allies will help shift the focus away from piecemeal fixes and short-term problem solving towards more permanent, structural reform.

The California judicial branch has made considerable progress in improving access to justice. The judiciary's administrative experience and strong relationships with the political branches provide a solid foundation upon which even more meaningful and sustainable reform can be built. By rethinking the structural and

9. The California judiciary has already seen the benefits of long-term structural transformations and is well-positioned to pursue further institutional reform. *See infra* text accompanying notes 24–36.

organizational underpinnings of access to justice, the judicial branch will be able promote additional long-term reforms that enhance both judicial branch independence and accountability.

Chief Justice Ronald M. George of the California Supreme Court described the progress to date in California in the following terms:

> We have made great strides toward recognition of the court system as not just another state agency, like the Department of Fish and Game or the Board of Cosmetology, but as a well-defined branch of government able prudently to manage its budget and appropriately to provide fiscal and administrative accountability to others. We seek change in not only the reality, but also the perception, of the judicial branch and its place in the governmental scheme. . . .
>
> We have sought to take our place as a fully equal branch of government, committed to managing resources, enhancing the administration of justice, and standing accountable to the legislative and executive branches—as well as to the public—for the actions of our branch. [10]

Part II provides an overview of access to justice and emphasizes the broad range of issues affecting access to the California courts. Part III traces the evolution of judicial branch administration in California, highlighting institutional reforms that have significantly improved access to justice, while noting the significant structural limits on access to justice that still remain. Part IV analyzes California's recent budget crises, underscoring the relationship between judicial-branch funding and access to justice. Part V explores new ways to think about judicial-branch problem solving and inter-branch relations, and challenges courts, policy makers, and other important stakeholders to reevaluate their strategies for improving the openness of the California courts.

10. Ronald M. George, *Brennan Lecture—Challenges Facing an Independent Judiciary*, 80 N.Y.U. L. REV. 1345, 1364 (2005).

II. ACCESS TO JUSTICE: A BRIEF OVERVIEW

A. The Traditional View: Access to Counsel

Historically, when academics, lawyers, bar associations, judges, and courts have gathered to talk about access to justice, the conversation has focused on questions associated with ensuring the practical availability of competent counsel to all persons regardless of their ability to pay. *Gideon v. Wainwright*[11] guarantees this type of access to justice for persons charged with crimes; for many years now there have been efforts by bar associations, advocates, courts, and a variety of access to justice commissions to establish, whether by legal right, funded programs, or pro bono efforts, similar access to counsel for litigants in at least certain types of civil cases. As Professor Gary Blasi points out in his article in this Symposium issue, "access to justice has come to be framed rather narrowly into four components: (1) access of (2) an individual (3) to a lawyer, or some form of assistance purported to be at least a partial substitute, (4) to help deal with a problem or dispute already framed in legal terms."[12] Many of the other articles[13] in this issue promote the same perspective.

No one would disagree with the importance of access to counsel as one of the key ingredients for gaining access to justice. Successfully navigating the procedural and substantive complexities of our legal system is a journey that is often best taken with an experienced hand at the wheel. While information technologies that are actively being developed bear some hope for the novice or unlicensed driver,[14] the road is still very risky travel for all but well-trained lawyers (and even trained lawyers get tripped up time and again). Thus, the focus on how to gain access to counsel is important, not only for the millions of unrepresented and

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11. 372 U.S. 335 (1963).

12. Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 914 (2009).

13. *E.g.*, Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087 (2009); Clare Pastore, *A Civil Right to Counsel: Closer to Reality?* 42 LOY. L.A. L. REV. 1065 (2009); *see also* Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1 (2009).

14. *See generally* Ronald W. Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117 (2009).

underrepresented citizens and litigants, but also for the courts and judges who must do their best to provide justice to those who lack representation.

However, treating access to justice as though it is *only* about providing access to competent counsel means missing a large part of the equation. For there to be meaningful access to justice, the courts and the entire justice system—broadly conceived—must be open, available, and accessible. Too often, the openness, availability, and accessibility of courts and the justice system are simply assumed as a given and are taken for granted. To those of us who closely follow the administration of courts and justice, there are grave dangers in assuming access to counsel alone will ensure that the courts are always open, available, and accessible in a meaningful way to all members of our growing and diverse society.

B. A Broader Perspective: Court Funding, Inter-Branch Relationships, and Effective Court Management

Access to justice encompasses much more than just access to legal services or legal aids, whether human or technological. At a minimum, the other dimensions of access include (a) available access to competent and impartial judges and court personnel who promote trust and confidence in the judiciary; (b) safe court facilities sufficient in capacity to handle caseloads; (c) basic dispute resolution services from the courts (such as case management services to keep cases moving or an adequate number of jurors for cases that go to trial); (d) court interpreters to assist California's diverse population in overcoming language barriers; (e) legal provisions allowing fees to be waived for indigent persons who cannot otherwise afford access to court; and (f) technologies now commonly used by counsel and parties in presenting cases. Again, the above is simply a representative sample.

At the beginning of the twentieth century, an accessible court may have involved little more than the availability of one or more courtrooms at the county seat with no more than the judges and their individual courtroom staffs. In this sense, the justice system was simple. Today, however, a twenty-first-century court is a complex set of interrelated systems (each of which must work in harmony with other justice systems), and the courts must make themselves accessible to an incredibly diverse and growing population.

In this modern setting, courts are not properly open, available, and accessible unless they have adequate resources to maintain all of their systems. Further, those resources must be carefully managed by judges and court management to ensure sufficient capacity, flexibility, and resiliency in the face of ever-changing demands. We live in an age when courts and their related justice systems must receive sufficient funding, which must be professionally administered to guarantee meaningful access to justice to the public.

Having sufficient resources that are properly administered is a bedrock requirement that becomes particularly salient during times of economic recession, when waves of budget cuts hit courts around the country. We have seen these cuts before, and we are seeing them now during the current down cycle. The direct effects of these budget shortfalls on access to justice, such as court closures, layoffs, reduced working hours, and the like, provide a stark reminder of the link between funding and court accessibility. Moreover, the judicial branch has the least elastic resource needs of any branch. During recessions or periods of budget shortfall, certain legislative and executive branch functions may be reduced. Cuts in legislative or executive services are certainly undesirable but are not inimical to the basic functions of those branches. However, providing *less* justice results in a failure of the very purpose of the judicial branch. Indeed, in economic downturns, the court system may well need *more* resources if it is to carry out its core functions.

However, the problems concerning resources, budgets, and proper court administration never go away, even in good economic times. The issue is not only the amount of funding, but what sort of programs and initiatives the funding supports, how that funding is allocated, who makes decisions about funding allocations and expenditures, and how courts can sustain long-term strategic planning initiatives and projects when funding decisions by the legislature and governor are usually made on only a one-year basis.

Court budgets are now so complex that they require closer cooperation and coordination among the judicial, executive, and legislative branches. It is not a simple matter of establishing and funding judges and their immediate staffs. There are many more stakeholders who have interests in how the courts operate and how funding decisions affect court management and operations. Those stakeholders—some of whom work within the courts and others who

are users of court services—voice their own perspectives on how courts should spend allocated money. They can influence governors and legislators as court budgets are considered in the annual budget process. It is often more than just appropriations that must be made. New court programs or changes in budgets frequently require alterations in substantive or procedural laws by the legislature.

Court leaders should not sit back passively during these important budget negotiations and legislative deliberations. Access to justice depends upon proper resource decisions being made in the legislative process. Too much is at stake for complacency. However, court leaders and courts face serious problems in getting involved. One problem they face is how to engage productively in the budget dialogue, which is inevitably an intensely political discussion. Another issue they face is how to engage productively in legislative advocacy without undermining or threatening the independence and impartiality of the judicial branch.

Court leaders must traverse a tightrope over a deep canyon. The journey calls for very careful deliberation and calibration. A false step along the path can, on one side of the rope, land the courts into the desert where new resources are as scarce as a drink of water. On the other side of the rope, the courts face being tossed very visibly into the rough-and-tumble world of everyday politics, which puts at substantial risk the public's trust and confidence in the courts as impartial arbiters of rights and law.

While the relationship between budgeting and access to justice is an important one, an even greater danger to access becomes apparent in times of economic recession and budget crises. Economic downturns not only highlight and exacerbate barriers to justice, but they also mask the more fundamental factors that prevent Californians from accessing justice by presenting the fiscal crisis of the day as a red herring ultimate cause, rather than as a current manifestation of deeper issues. To illustrate, access barriers such as reduced working hours or a lack of court personnel are rarely the result of a particular economic low point. Instead, they are the long-term result of chronic, systemic underfunding of the judiciary or benign neglect by the other branches. As such, intermittent problem solving cannot and will not improve access to justice in the long term. Likewise, improving the judiciary's existing relationships with the political branches, though necessary and worthwhile, ultimately

falls short of addressing the complex institutional factors that determine the courts' openness. What are needed, then, are new ways of thinking about judicial-branch problem solving and the judiciary's relationships with the other branches, academics, the legal community, and the public.

III. ACCESS TO JUSTICE IN CALIFORNIA

The idea that judicial leaders should focus on long-term, institutional reform over piecemeal, uncoordinated problem solving is not a particularly novel theory given the history of the California courts. During the past two decades, the Judicial Council and the Administrative Office of the Courts have systematically transformed the judicial branch's structure and policies, promoting enhanced coordination, consistency, and long-range planning.[15] The judicial leadership's focus on long-term reforms has served the California courts and people well in improving access to the courts.

A. The Evolution of Judicial Branch Administration

Twenty years ago, California's judicial branch was fragmented, and leadership was scattered. The Judicial Council focused its attention primarily on court procedures and practices, and the Administrative Office of the Courts informed much of this work through caseload statistics it gathered.[16] Although major issues and policies of statewide concern came before the Judicial Council, it had not historically been particularly effective in leading change within the judicial system.[17] Moreover, because the Judicial Council could not fund statewide initiatives, it was largely just a recommending body. In addition, the trial courts were structurally, and by temperament, fiercely independent entities. Each superior, municipal, and justice court—all 220 of them[18]—had the potential to

15. *See infra* text accompanying notes 24–36.

16. "To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute." CAL. CONST. art. XI, § 6(d).

17. The majority of the issues and policies the Council dealt with concerned the appellate system. This trend made sense because the appellate system was funded by the state while most of the funding for the trial courts came from local sources.

18. J. Clark Kelso & Roger K. Warren, *Trial Court Unification: Proposed Constitutional Amendments and Commentary as Adopted by the Judicial Council*, 25 PAC. L.J. 239, 257–58 (1994).

be its own fiefdom, and that is how many actually behaved. Because funding for the trial courts came primarily from local government, the trial courts naturally owed their primary allegiance to local government and paid greatest attention to local issues. The trial courts set and followed their own priorities, practices, and customs.

It began to appear to many court leaders that the absence of strong statewide leadership on judicial issues was putting equal access to justice at significant risk, particularly given certain statewide revenue and governance trends that were playing out in California over a multi-year period. As local revenue sources upon which trial courts relied became unstable,[19] Proposition 13[20] and its consequences became a concern. There was constant talk in the state capitol of realigning various state and local programs.[21] The imposition of term limits on the legislature foreshadowed a time when well-established relationships with key legislative leaders would be replaced by more transitory figures who might or might not have an understanding of the needs of the judiciary or the role of separation of powers. When recessions drove the state's budget into crises, raids upon local revenue sources often resulted. California's burgeoning population, which increased substantially over the last half century,[22] further complicated matters. The state fell behind in establishing superior court judgeships even as the number of persons charged with felonies was dramatically and steadily increasing throughout the 1980s and 1990s.[23] Superior court criminal dockets were overflowing, while access to civil justice and civil courtrooms was increasingly delayed by three, four, or five years.[24] Solutions

19. The solution to this instability was ultimately enacted a decade later with passage of the Trial Court Funding Act of 1997, which shifted responsibility for funding the trial courts from local government to the state. *See infra* notes 37 & 39.

20. Proposition 13, which limited property taxation by local governments, was approved by California voters in 1978. CAL. CONST. art. XIII, § A.

21. Realignment of state and local functions continues to be a topic of significant political concern in California. *See, e.g.*, Dan Walters, *State-Local Symbiosis Gets Deeper*, SACRAMENTO BEE, Feb. 27, 2007, at A3 ("The past three decades . . . have seen a historic realignment of state and local government responsibilities—and, as is common in such matters, it happened by accident rather than specific intent.").

22. PUBLIC POLICY INSTITUTE OF CALIFORNIA, CALIFORNIA'S POPULATION, (July 2006), http://www.ppic.org/content/pubs/jtf/JTF_PopulationJTF.pdf, at 1–2.

23. *See* Kelso & Warren, *supra* note 18, at 252–54.

24. JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, STATE COURT OUTLOOK, ANNUAL REPORT 43–45 (1998), *available at* http://www.courtinfo.ca.gov/reference/documents/98sco-2.pdf.

could not be found at the local level. The problems were statewide in nature.

Some major changes needed to be made. But change was by no means inevitable. Recall Roscoe Pound's observation that "[t]he instinct of the lawyer to scrutinize with suspicion all projects to reform has always retarded" prospects for change.[25]

Change requires leadership, and that leadership came in the early 1990s from Chief Justice Malcolm Lucas. It was during his tenure that the entire court family came together to consider the major challenges facing the California court system and how those challenges could best be addressed. Chief Justice Lucas set the tone for what was to come: "If we do not plan for the future, others stand willing to plan for us. If we abdicate our role in planning for an adequately funded and properly operated judicial branch, we risk losing our independence and ability to provide justice."[26]

First under Chief Justice Lucas, and then under his successor, Chief Justice Ronald M. George, the Judicial Council increasingly turned from matters of procedure and practice to matters of branch governance.[27] With a focus on implementation and inter-branch negotiation, Chief Justice George brought with him an enthusiastic interest in judicial administration. Under his leadership, the Judicial Council turned from responding to numerous small problems to a systematic and forward-looking strategic planning process to guide the Judicial Council and the courts in making resource decisions.[28] These shifts marked the beginning of a transformation of California's judicial branch from a loose collection of independent courts to a more cohesive branch of government, capable of governing and leading itself. The shift marked the beginning of several equally transformational changes that improved access to justice statewide.

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25. Roscoe Pound, *The Crisis in American Law*, 10 J. AM. JUDICATURE SOC'Y 5, 10 (1926).

26. JUDICIAL COUNCIL OF CALIFORNIA, 1992 ANNUAL REPORT 5 (1993).

27. JUDICIAL COUNCIL OF CALIFORNIA, STRATEGIC PLAN—LEADING JUSTICE INTO THE FUTURE 1, 1 (2000), http://www.courtinfo.ca.gov/reference/documents/stplan2k.pdf ("Since its inception in 1992, the Strategic Plan has provided a vision and direction for the California court system. The state's courts have recently navigated some of the most significant initiatives and reforms in our history. Among the most profound are the transition from local to state funding of the trial courts, the unification of trial courts, the implementation of jury system improvements, a comprehensive program to increase the number and quality of court interpreters, and ongoing advances in the use of technology to improve court efficiency and access.").

28. *See, e.g.*, JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 2.

B. Improving Access to Justice: Structural Reform

In 1992, the Judicial Council restructured its governance processes and established broad goals and objectives to promote major statewide reforms.[29] As the Judicial Council staked out a greater role in branch leadership, it increasingly advocated broad-based institutional reforms designed to enhance access to justice statewide.

The two most significant structural reforms over the last twenty years have been trial-court unification and trial-court funding. These reforms set the foundation upon which a series of additional improvements have been built, including (a) changes dealing with trial-court facilities and courthouse construction; (b) the creation and growth of both the Center for Families, Children and the Courts, and Collaborative Justice Courts; (c) improvements in the application and use of technology to support court functions; and (d) a host of other reforms that have made the courts more accessible. Each of these changes has contributed to making California's courts more open, available, and accessible.

1. Trial-Court Unification

Twenty years ago, there were three trial-level courts in California: justice courts, municipal courts, and superior courts. Justice and municipal courts exercised the same jurisdiction over small civil claims and misdemeanors. Superior courts had jurisdiction over everything else (i.e., felonies and all other civil actions). Each county had one countywide superior court, as well as one or more municipal or justice courts within the county, depending on the population of the judicial districts established in each county by its board of supervisors.[30]

As originally envisioned and in practice, these three separate courts operated entirely within their own universes. Within a single county, these courts had distinct jurisdictions, distinct local leadership, distinct staffing, distinct policy and procedures, distinct local rules of practice and procedure, distinct information technology systems, distinct filing systems, and so on. Despite serving

29. *Id.* at 1 ("Since its inception in 1992, the strategic plan has provided a mission and direction for California's judicial branch.").

30. Los Angeles Superior Court, About the Court: Historical Perspective, http://www.lasuperiorcourt.org/aboutcourt/history.htm (last visited Aug. 18, 2009).

essentially the same population in overlapping geographic jurisdictions, these courts shared very little.

The predictable results were duplicated efforts and programs, inefficiency and waste, and misallocated resources between the courts for lengthy periods of time. For example, in the late 1980s and early 1990s, felony caseloads outpaced the resources of the superior courts in many counties, resulting in substantial delays in civil cases.[31] At the same time, however, municipal and justice courts generally had too little work to keep them occupied. Yet these courts were so disconnected that efforts to apply municipal- or justice-court resources to help out the overcrowded superior courts were difficult to implement.

Consequently, the Judicial Council sought to unify the trial courts to enhance flexibility and maximize efficiency. California voters eliminated the justice courts in 1994, turning those remaining justice courts into municipal courts.[32] In 1998, voters unified the trial courts,[33] thereby improving the use and organization of judicial resources, reducing duplicated efforts, and improving administrative efficiencies.

As Chief Justice Ronald M. George noted while addressing a joint session of the California Legislature in 2001:

> The prime anticipated benefit of unification was the flexibility it would afford in using available judicial and administrative resources. Not only has this flexibility turned out to be tremendously useful in expanding existing services, but another benefit has emerged as well: it has permitted a great amount of innovation, allowing the public's needs to be met by new and previously unavailable means.[34]

Unification also had a significant impact on governance within the judicial branch. Because the number of independent trial courts

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31. *See* HANDBOOK OF PUBLIC ADMINISTRATION 1034 (Jack Rabin, W. Bartley Hildreth & Gerald Miller eds., 3d ed. 2007).

32. 1994 Cal. Stat. Res. ch. 113 (SCA 7) (Proposition 191, approved by electors Nov. 8, 1994).

33. 1996 Cal. Stat. Res. ch. 36 (SCA 4) (Proposition 220, approved by electors June 2, 1998).

34. Ronald M. George, Chief Justice, Cal. Supreme Court, State of the Judiciary, Address to a Joint Session of the California Legislature (Mar. 20, 2001), *available at* http://www.courtinfo.ca.gov/reference/soj0301.htm).

fell from 220 at the beginning of the 1990s to 58 at the beginning of the 2000s, the branch and the Judicial Council were able to govern much more effectively.[35] Fewer organizational entities within the branch meant simplified intra-branch communication, consensus building, and decision making. In addition, the Judicial Council converted seats reserved for municipal-court representation to superior-court seats, thereby amplifying the superior courts' voice on the Judicial Council.[36] This was an appropriate step given the trial courts' structural and operational importance to the branch. The Judicial Council also continued its practice of appointing three non-voting trial-court administrators to sit with the Judicial Council, again recognizing the key role trial courts played in promoting access to the courts.

2. Trial-Court Funding

The implementation of state-level trial-court funding solidified the Judicial Council's capacity to govern the branch.[37] The Judicial Council's objective was to create a stable source of revenue for the trial courts, while also enhancing overall judicial-branch accountability with regard to how that revenue was used.[38] The result was that the legislature determined overall funding for all of the trial courts as a group in the usual state-budget process.[39] The Judicial Council also succeeded in gaining the authority to allocate those funds to trial courts pursuant to internal planning and budget processes that the Judicial Council itself oversaw.[40]

This is not to suggest, however, that the Judicial Council exercises unfettered control over trial courts' fiscal affairs. In fact,

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35. *Id.*

36. 1996 Cal. Stat. Res. Ch. 36 (SCA 4) (Proposition 220, approved by electors June 2, 1998); *see also* CAL. CONST. art. VI, § 6(a) (specifying membership of the Judicial Council).

37. State trial court funding was achieved in the Lockyer-Isenberg Trial Court Funding Act of 1997. 1997 Cal. Stat. ch. 850. The details of the trial court funding legislation are unnecessary to review for our purposes, other than to say they involved a fundamental realignment of state and local funding and responsibility for the trial courts.

38. George, *supra* note 34.

39. Governor's 2009–10 Proposed Budget Detail, Judicial Branch Mission Statement, http://www.ebudget.ca.gov/StateAgencyBudgets/0010/0250/mission_statement.html (last visited Sept. 18, 2009) ("Chapter 850, Statutes of 1997, enacted the Lockyer-Isenberg Trial Court Funding Act of 1997 to provide a stable and consistent funding source for the trial courts. Beginning with the 1997–98 fiscal year, consolidation of the costs of operation of the trial courts was implemented at the state level . . . .").

40. George, *supra* note 34.

there is a very elaborate process for ensuring that trial-court requests for funding receive appropriate attention.[41] If a court needs special funding to deal with peculiarly local conditions, those special requests are carefully considered. However, the most savvy trial courts recognized that budget requests aligned with Judicial Council themes, values, and goals were more likely to be favorably received, and immediately started following the Judicial Council's strategic planning processes much more closely.

3. The Impact of Trial-Court Funding and Unification

As implemented under the Judicial Council's direction, trial-court unification and funding have resulted in greater consistency in organizational behavior and court administration. Unification and funding have led to the adoption of more uniform standards, procedures, and requirements in the trial courts (to the great benefit of counsel who practice statewide); a more equitable distribution of resources among the trial courts; the removal of trial courts from the influence of local government and local politics; and most important, the preservation of judicial impartiality in resolving cases and in managing the operations of the courts.[42]

Trial-court unification and funding also ultimately highlighted many outstanding needs pertaining to access, such as planning and funding of courthouse facilities; the problem of unrepresented and underrepresented litigants, particularly in family law cases; the need for new methods for solving problems, such as the collaborative justice courts that combine close judicial supervision with rehabilitation and social services to handle cases involving less serious drug offenses, mental health problems, domestic violence, and juvenile matters; necessary improvements to the jury system, including adoption of plain-English jury instructions; and the adoption of a statewide information technology agenda for both administrative and case-management systems.

In addition to the unification and funding that make further reforms addressing these outstanding needs possible, this shift

41. Thus, the Judicial Council does not follow the Golden Rule of Budgeting that "he who holds the gold, rules." Murphy's Laws Site, http://www.murphys-laws.com/murphy/murphy-laws.html (last visited Aug. 18, 2009) (stating "Murphy's golden rule: whoever has the gold makes the rules").

42. *See* George, *supra* note 34.

towards statewide solutions and unified-branch governance promoted greater long-range planning within the judicial branch. The Judicial Council's strategic and operational plans, which have set forth broad goals and specific objectives within the branch, help guide administrative policymaking.[43]

C. Challenges to Access to Justice That Remain in California Today

Unification, trial-court funding, and the transformation of the Judicial Council from a reactive body to a governance and policymaking body did not sweep away all problems relating to access to justice. While these changes have certainly materially improved the judiciary's ability to identify, assess, and respond to access to justice problems, problems still persist. Specifically, issues continue to exist where the solution requires substantially more resources.

This section of the Article provides three specific examples of particularly clear access to justice challenges that California's courts have faced in recent years. These examples show just how fragile access to justice really is in California, even under our current unified, statewide court system. This system operates under constant stress in an environment where budget allocations systematically tend to lag behind need. In this environment, any external shocks or surprises to the system can quickly lead to crisis conditions.

This section closes by describing a somewhat less visible but more insidious set of issues affecting access to justice resulting from threats to public trust and confidence in the judiciary and court processes. If the public loses faith in the courts and its processes, access to justice will suffer because the public will increasingly turn elsewhere to resolve their legal issues. For access to justice to be truly meaningful, the public must perceive it as worthwhile and desirable.

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43. *See, e.g.*, JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 2, at 24; JUDICIAL COUNCIL OF CALIFORNIA, THE OPERATIONAL PLAN FOR CALIFORNIA'S JUDICIAL BRANCH 2008–2011 (2008), *available at* http://www.courtinfo.ca.gov/reference/documents/2008_operational_plan.pdf (setting forth courses of action for achieving strategic goals).

1. California's Crumbling Courthouses

Access to justice is clearly impaired when the courthouse simply does not have enough safe or appropriate space to do the business at hand. Notwithstanding the Judicial Council's work in this area in recent years, this impairment is still the case in far too many courts in California.

One of the logical consequences of state-level funding for the trial courts was to transfer ownership, control, and management of trial-court facilities from the counties to the state. The transfer was desperately needed because so many of those facilities had languished under local control and were urgently in need of repair and rebuilding.[44] The legislature authorized the transfer through the Trial Court Facilities Act of 2002 ("Facilities Act")[45]—landmark legislation that shifted the governance of courthouses from the counties to the state.[46] This shift to state governance has enabled the Judicial Council to document courthouse needs and to develop a methodical and uniform process for addressing those needs.[47]

As the Judicial Council has discovered, the condition of courthouses varies substantially from county to county.[48] Moreover, in many counties, when funding for trial-court operations transferred from the county to the state, the county government simply stopped

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44. George, *supra* note 34.

45. 2002 Cal. Stat. ch. 1082S (codified as amended at CAL. GOV'T CODE §§ 70301–70403 (West 2009)).

46. Specifically, the Facilities Act provided a mechanism for the execution of county-specific transfer agreements pursuant to which responsibility for a county court facility would pass from the county to the state. *Id.* As of December 31, 2008, the Administrative Office of the Courts completed courthouse transfer agreements for 466 facilities out of more than 500 in the state. JUDICIAL COUNCIL OF CALIFORNIA, FACT SHEET: TRANSFER OF COURT FACILITIES (2009), *available at* http://www.courtinfo.ca.gov/reference/documents/factsheets/factrans.pdf. All transfers should be completed by December 31, 2009. *Id.*

47. *See* George, *supra* note 34. Governor Gray Davis explained as follows in his signing message for the Facilities Act:

> The transfer of responsibility for all local court facilities from the counties to the state, as authorized by this bill, will complete the transformation of a local court system to a fully state operated state system. Now the court system can be managed and operated under the oversight of the Judicial Council, which can provide consistent policies and procedures to ensure the uniformity of how courts operate on a statewide basis.

CAL. GOV'T CODE § 69202 (West 2009) (reprinting Governor Davis' signing message for 2002 Cal. Stat. ch. 1082).

48. *See* George, *supra* note 11, at 1352.

providing any meaningful support for building maintenance or capital improvements.[49]

Thus, despite the Judicial Council's efforts to date, the condition of many of California's courthouses is truly alarming. Conditions in many courthouse facilities throughout the state jeopardize public safety and security, undermine court efficiency, limit equal access, and do not provide the public with the appropriate space to handle the matters that bring them to court.[50] In many courthouses, there are no secure points of entry or holding cells, and inmates are transported daily through public corridors.[51] In some counties, space is at such a premium and overcrowding is so serious that closets have been converted into offices.[52] In one county, the courts operate out of temporary trailers and have "temporarily" done so for over twenty years.[53] In addition, populations continue to grow substantially in new areas where courthouses do not exist at all.[54]

We have seen that transferring ownership does nothing by itself to solve the facility needs facing the courts. Solving the facility problem ultimately takes money, and lots of it. However, by putting ownership in the hands of the courts themselves, the transfers ensured that advocacy for capital-improvement resources would be in the hands of the entity with the greatest interest in having the improvements made (i.e., the courts). As a result of the efforts of the Judicial Council, those resources have been made available in the form of an authorization for issuance of up to five billion dollars in revenue bonds to support the construction and renovation of courthouses.[55] In order to secure this authorization, the Judicial

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49. *See id.* at 1359. The consequences of this are well-documented and appalling. *See* JUDICIAL COUNCIL OF CALIFORNIA, WHAT JUDICIAL OFFICERS AND COURT PRACTITIONERS ARE SAYING ABOUT THE NEED FOR COURT FACILITY BOND FUNDING: EXCERPTS FROM LETTERS TO THE LEGISLATURE, 2005–2006, at 11, 28 (2006), *available at* http://www.courtinfo.ca.gov/programs/occm/documents/Facilities_LettersToLeg_PublicRevised.pdf.

50. *See* Ronald M. George, Chief Justice, Cal. Supreme Court, State of the Judiciary, Address to a Joint Session of the California Legislature (Feb. 28, 2006), *available at* http://www.courtinfo.ca.gov/reference/soj022806.htm.

51. *See id.*; George, *supra* note 10, at 1359.

52. *See id.*

53. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 50, at 15–16, 26–27 (discussing San Bernardino and San Joaquin Counties).

54. *Id.* at 1, 18 (discussing Alameda, Contra Costa, and El Dorado Counties).

55. The California legislature enacted and the governor signed S.B. 1407 (Perata) in September 2008. 2008 Cal. Stat. ch. 311. What should have been a nonpartisan bill was ultimately passed with only Democratic votes, in part because some Republicans objected to two

Council spent years negotiating with key court stakeholders and users to garner support for a series of increases to court fees, assessments, and penalties imposed on court users to support the urgently needed capital improvements and repairs.[56] These increases meant that no state General Fund dollars needed to be diverted to finance courthouse construction. Holding the General Fund harmless from these additional expenses was the only way the legislature could support the courthouse construction effort.[57]

Going forward, it will now be up to the Judicial Council and the Administrative Office of the Courts to prioritize these construction expenditures. In this instance, it appears the Judicial Council has matched a long-term problem with a long-term solution, although it will still be many years before construction efforts can catch up with the deferred capital needs of California's courts.

2. The Judgeship Gap

Although seemingly axiomatic, it is important to remember that access to justice means, at a very basic level, access to a sufficient number of competent judges to handle the volume of cases filed each year in California's courts. One of the Judicial Council's most important tasks is assessing the number of judgeships that need to be created to complete the work of the courts in a timely manner and, furthermore, convincing the governor and the legislature to establish, fund, and fill these judgeships. If the number of judges is significantly lower than required, the work simply will not be done in a timely manner. Backlogs will begin to grow, and priority work will be accomplished first (e.g., handling the felony docket), while other work will suffer and access to justice will be thwarted.

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recent decisions by the California Supreme Court. One decision approved same-gender marriage, and another dealt with the state's power to deny parole to murderers. One of the Republicans who abstained explained, "I think those two opinions written by Chief Justice George really soured people on the court issue . . . even though intellectually we all understand that the funding of the courts really has nothing to do with Chief Justice George's writing of a particular legal opinion." Patrick McGreevy & Nancy Vogel, *GOP Fails to Block Plan to Upgrade Courthouses*, L.A. TIMES, Aug. 30, 2008, at B3. This episode is a good example of how difficult it can be for legislators to remain apolitical when dealing with court funding and resource issues.

56. *See* George, *supra* note 10, at 1359–60.

57. S.B. 1407 provides that the funding be used for those projects the Judicial Council has classified as either immediate need or critical need projects. 2008 Cal. Stat. ch. 311. The amount of money provided by the legislation will, under the best of circumstances, only meet less than one half of those needs.

Over the years, the Administrative Office of the Courts has developed detailed models for how judicial work actually gets accomplished.[58] These models are based on years of experience and analysis of trial-court operations in practice. The models permit the Judicial Council to make systematic and consistent recommendations to the governor and the legislature for how many judges are necessary to process any given caseload. Several years ago, the models showed that the California courts needed an additional 349 judges to keep up with the workload; this amounted to only a 15.5 percent increase in the number of judges.[59] This is a very substantial shortfall. In response to the continued shortage of judges, the Judicial Council sought legislative approval to establish fifty new judgeships for each of three years (fiscal year 2006–07 through fiscal year 2008–09).[60] The state's budget for 2006 authorized the first fifty judgeships, which have now been established.[61] However, because of the state's continuing budget crisis, the remaining judgeships have never been funded. A more recent judgeship analysis now puts the need at 377 judges. As a result, even though fifty judges were added in 2006, the judgeship gap is growing.[62]

The ultimate gap is even bigger than these figures present because the models to assess judicial need were based on an analysis of how courts actually process cases, rather than on how courts should process cases. In the state's high-volume courts (e.g., traffic courts), cases are often processed in a "cattle call" manner that does not meet the ideals of due process and, more troublingly, undermines public trust and confidence in the courts. The legislature has now requested that the model be adjusted to show how many judges would be necessary to handle the caseload if the courts were able to

58. *See* Press Release, Administrative Office of the Courts, New Judgeship Needs Process Approved for California Trial Courts (Aug. 28, 2001), *available at* http://www.courtinfo.ca.gov/presscenter/newsreleases/NR57-01.HTM.

59. *See* DAG MACLEOD ET AL., JUDICIAL COUNCIL OF CALIFORNIA, UPDATE OF THE JUDICIAL WORKLOAD ASSESSMENT (Oct. 8, 2008), *available at* http://www.courtinfo.ca.gov/reference/documents/100808item1.pdf.

60. KIM DAVIS ET AL., JUDICIAL COUNCIL OF CALIFORNIA, COURT FACILITIES PLANNING: ALLOCATION OF FY 2007–2008 FUNDING FOR THE SECOND GROUP OF 50 (ASSEMBLY BILL 159) NEW TRIAL COURT JUDGESHIPS (Oct. 26, 2007), *available at* http://www.courtinfo.ca.gov/jc/documents/reports/102607itemB.pdf.

61. *Id.*

62. *See* MACLEOD ET AL., *supra* note 59, at 3.

process cases properly (which will require adding processing time to the high-volume caseload).

As discussed earlier in this Article, however, we do not mean to suggest that California's current judgeship gap may or should be viewed solely as the product of recent budget shortfalls. Like many limits on access to justice, the lack of judges in the California courts is the result of chronic underfunding of judicial positions and of tepid, piecemeal efforts to manage the problem. That is, California's recent budget crisis underscored, exacerbated, and illuminated our current critical need for more judges, but it did not create the judgeship gap by itself. In addition to budget hurdles, partisan political maneuvering has also affected the judgeship gap, as legislators use judgeship bills to express disagreement or disappointment with governors or with courts' recent decisions.

An inadequate number of judges is a serious access to justice problem. The state needs to address this long-standing problem or risk widespread, unacceptable delays in civil and other cases.

Case Study: Riverside County Superior Court

The Riverside County Superior Court's difficulties managing an overwhelming caseload with too few judges provide a useful illustration of the judgeship gap. In recent years, the Riverside Superior Court has struggled to deal with a crushing criminal caseload that led to long delays in felony trials and a virtual shutdown of its civil calendar.[63] Access to justice was being both delayed and denied. In June 2007, the Chief Justice appointed the Riverside Criminal Backlog Reduction Task Force, chaired by Justice Richard D. Huffman.[64] The Task Force, which was comprised of both active and retired judges from around the state, issued a report to the Judicial Council on its activities on August 1, 2008.[65] An extended excerpt from the summary of that report describes in detail the access to justice challenge and the Task Force's responsive efforts:

63. RICHARD D. HUFFMAN, REPORT OF THE RIVERSIDE CRIMINAL BACKLOG REDUCTION TASK FORCE 5 (2008), *available at* http://www.courtinfo.ca.gov/jc/documents/reports/081508item10.pdf.

64. Associate Justice of the Court of Appeal, Fourth Appellate District, Division One; Chair of the Judicial Council's Executive and Planning Committee.

65. HUFFMAN, *supra* note 63, at 1.

In summary, the problems facing the Riverside court, which led to the Strike Force efforts, arose from a combination of factors that created a criminal caseload the court could not handle in a timely manner with the system and resources then in place. Riverside County had experienced population growth far outpacing the statewide average. The court had not received any significant increase in judicial resources during that time, and the criminal case filings had grown dramatically.

The Riverside County District Attorney established and diligently enforced a very vigorous charging policy and a very restrictive policy on plea bargaining, often referring to concentrated criminal case settlement efforts as "bake sales." The prosecutor has reluctantly participated in court-organized settlement processes and voices concern about such activities. The prosecutor believes that post-information plea bargaining for serious felonies is unlawful and has both the resources and determination to try large numbers of jury trials in order to enforce his charging and dispositional policies.

By way of example, in 2006–2007 the Riverside court tried 800 criminal jury trials (539 felonies and 261 misdemeanors). The numbers for 2007–2008 should approach 900. Nearby San Bernardino County, with a similar population, crime problem, and judicial resources, tried only a fraction of the number of criminal jury trials as compared to Riverside even though the caseload per judge in San Bernardino is higher than that in Riverside.

While raw numbers do not fully explain differences or problems, they do indicate that as of July 2007 the court simply could not try enough jury trials with its resources to address its crushing criminal caseload. The caseload had resulted in a near-total shutdown of civil trials.

[The Administrative Office of the Courts ("AOC") leadership] met with the Riverside judges before there were any discussions of actions to assist that court. As a result of that meeting, [the AOC leadership] realized that the Riverside court was in a state of crisis, that the court was

struggling to keep up with its caseload, and that some help was necessary in order for that court to deal with its backlog of criminal and civil cases. [They] met with the Chief Justice and proposed a strike force concept as part of an effort to help the Riverside court deal with its criminal cases and potentially improve access for the public to civil trials. [The AOC leadership] has worked closely with those involved in the efforts to assist the Riverside court and has provided constant support for both the criminal and civil caseload issues.

The decision of Chief Justice Ronald M. George to provide the unprecedented level of assistance to Riverside without any additional funding provided to the branch was a recognition that not only was the criminal justice system in Riverside at a crisis point, but also that access to civil trials had been all but denied to the residents of that county.

The efforts described in this report were based upon a three-prong approach: (1) advocacy for more judicial resources, (2) a strike team of experienced criminal law judges to attack a backlog of ancient criminal cases, and (3) an effort to get the court and its justice partners to make changes in their approach to criminal case management.

The effort to get more judges for Riverside has been partially successful, but the state's budget difficulties have delayed full implementation of this part of the solution.

The Strike Force effort to attack the backlog and to aid the Riverside court in dealing with some of its ongoing caseload was a phenomenal success. The volunteer spirit of both active and retired judges from all parts of California was one of the finest examples of the judicial branch coming together to aid one of its courts that most of us have ever seen. The judges who participated with the Strike Force were outstanding criminal trial judges. Their absence from their home courts, as either active or retired judges, placed a significant burden on those courts, a burden those courts willingly accepted.[66]

66. *Id.* at 1–3.

While the magnitude of the crisis in Riverside County was unusual, the basic elements leading to the crisis were anything but unusual: population increases leading to increased caseloads, inefficient caseload management, a failure by the state to create new judgeships commensurate with need, and one or more external events that tipped the system into crisis (in this instance, the district attorney's "no pleas" policy).[67] When a crisis occurs, the judicial branch responds, and a crisis response invariably involves reallocation of existing branch resources. Indeed, the Riverside case highlights the Judicial Council's ability to respond to such crises quickly in order to mitigate the negative consequences for the public. Still, additional state funding in response to such crises is invariably delayed and often barely sufficient to meet the crisis, much less to handle readily foreseeable growth.

The Riverside case, therefore, is symptomatic of the statewide judgeship gap and underscores the thesis of this Article. Years of neglect and the chronic underfunding of judicial positions caused the crisis in the Riverside County Superior Court. Although the Judicial Council was able to manage the Riverside case effectively and efficiently, the conditions that spurred this crisis remain statewide, and an ultimate recurrence in Riverside or elsewhere is inevitable unless systemic changes are identified and implemented. Instead of careening from crisis to crisis, we need to address underlying causes with long-term solutions.

3. Lack of Public Trust and Confidence as a Consequence of Not Providing Meaningful Access

A lack of meaningful access to the courts can undermine and erode the public's trust and confidence in the courts and the judicial process. The erosion of public trust and confidence can then feed on itself, with feelings of mistrust creating their own additional barrier to access. For instance, if a person or business lacks trust and confidence in the courts, disputes that *should* be brought to the courts for resolution will be less likely to land in court. In this way, a decline in public trust and confidence and a lack of access can reinforce each other in a downward spiral.

67. *Id.*

The Judicial Council and the Administrative Office of the Courts have periodically commissioned public surveys to gauge public sentiment, trust, and confidence in the courts. In 2005, the Judicial Council undertook a statewide survey of the public and of practicing attorneys to determine current levels of trust and confidence in the state courts and to obtain information concerning expectations of and performance by the state courts.[68] The survey reached over 2,400 members of the public and over 500 practicing attorneys.[69] In 2006, a second phase of the study delved more deeply into key issues raised by stakeholders.[70] Using focus groups and interviews, researchers sought direct information from court users and judicial-branch members—new information to yield specific, effective strategies for addressing court-user concerns identified by the 2005 survey.[71] The most recent results demonstrated that, by and large, Californians were satisfied with their court system.[72]

While these survey results are gratifying, serious risks to public trust are on the horizon. Recently, concerns over the financing of judicial elections have emerged at the forefront of discussions about the public's trust and confidence in the judiciary. Nationally, campaign contributions and independent expenditures in judicial elections have increased dramatically over the last decade.[73] Moreover, polling data indicate that the majority of the public and a

68. DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS (2005), *available at* http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf.

69. *Id.* at 1.

70. PUBLIC AGENDA & DOBLE RESEARCH ASSOCIATES, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: PUBLIC COURT USERS AND JUDICIAL BRANCH MEMBERS TALK ABOUT THE CALIFORNIA COURTS (2006), *available at* http://www.courtinfo.ca.gov/reference/documents/Calif_Courts_Book_rev6.pdf.

71. *Id.* at 2.

72. *Id.* at 8. The 2005 survey found that 67 percent of the public had a positive attitude about the courts, compared to less than 50 percent in 1992. *Id.* at 2. However, the survey noted two areas with greater levels of dissatisfaction. First, the processes employed in high-volume courts, such as traffic court and family court, left litigants feeling like they never really had a fair opportunity to present their side of the story. *Id.* at 36. In the case of traffic court, this dissatisfaction likely results from the speed with which cases are processed. In family court, dissatisfaction results in part because there are so many unrepresented litigants, and litigants enter and leave the system confused about the processes. Second, the results showed that trust and confidence sometimes varied across demographic lines. *Id.*

73. *See* JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 15–20 (Jesse Rutledge, ed., 2006), *available at* http://www.brennancenter.org/page/-/d/download_file_48787.pdf.

significant proportion of state judges believe that campaign contributions made to judges have some influence on their decisions.[74] The U.S. Supreme Court recently decided a case in which the CEO of A.T. Massey Coal Company spent $3 million to elect the West Virginia Chief Justice while a multimillion-dollar appeal involving the company was pending before the state supreme court.[75] The West Virginia Chief Justice cast the tie-breaking vote to overturn a $50 million verdict against Massey.[76] The U.S. Supreme Court held that due process was violated when the West Virginia Chief Justice failed to recuse himself, and concluded that the probability of actual bias was too high to be constitutionally acceptable under the circumstances.[77]

Recent judicial elections in several states have raised similar concerns over judicial campaign conduct. Following the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*,[78] many states have wrestled with the ethical responsibilities of judicial candidates.[79] Campaign advertisements in states such as Wisconsin, Michigan, Washington, and Alabama have raised profound questions about the boundaries of appropriate judicial campaign conduct.[80]

The Judicial Council has taken proactive steps to insulate the California courts from the potentially damaging effects of increased judicial campaign contributions and spending and of more politically charged judicial campaigns. In September 2007, Chief Justice Ronald M. George formed the Commission for Impartial Courts ("Commission") to study and make recommendations to the Judicial Council in order to safeguard the quality, impartiality, and

74. GREENBERG QUINLAN ROSNER RESEARCH & AMERICAN VIEWPOINT, JUSTICE AT STAKE: NATIONAL SURVEYS OF AMERICAN VOTERS AND STATE JUDGES 1 (2002), *available at* http://www.gavelgrab.org/wp-content/resources/polls/PollingsummaryFINAL.pdf.

75. Caperton v. A.T. Massey Coal Co., No. 08-22, 2009 WL 1576573, at *4 (U.S. June 8, 2009).

76. *Id.*

77. *Id.* at *12.

78. 536 U.S. 765 (2002). In *White*, the Court held that a clause in the Minnesota Code of Judicial Ethics prohibiting judicial candidates from stating their views on certain issues was unconstitutional. *Id.* at 788.

79. *See* Richard L. Hasen, *First Amendment Limits on Regulating Judicial Campaigns*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS 22–29 (Matthew J. Streb ed., New York University Press 2007).

80. *See* SAMPLE ET AL., *supra* note 73, at 4–5, 12–13.

accountability of the California judiciary.[81] The Commission presented its final recommendations to the Judicial Council in October 2009.[82]

The examples above show that access to justice is influenced by a very wide range of considerations, some of which are direct and obvious (such as the number of judges and the capacity of facilities) and others of which are just as important but much more subtle in their operation (such as changes in election practices that may undermine public trust and confidence in the courts).

IV. BUDGET CRISES AND ACCESS TO JUSTICE

In Part III, we examined the evolution of judicial-branch administration in California and provided a detailed examination of how that evolution has affected three particular facets of the broad concept of access to justice.[83] Despite the great strides that California's judiciary has made, challenges remain. These challenges not only illustrate the need for ongoing reform within the judicial branch itself, but they also shine a light on what has become nationally, especially in California, one of the most serious long-term threats to access to justice: insufficient resources to meet the needs of the public. As previously indicated, this problem is much broader than the current deep recession, although the current recession is certainly resulting in its share of court layoffs, closures, and cutbacks.[84] The problem has persisted now for well over a decade, and forecasts of government spending, including those for court expenditures, do not suggest any significant improvements.

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81. Press Release, Judicial Council of California, Chief Justice George Names Statewide Commission for Impartial Courts (Sept. 4, 2007), *available at* http://www.courtinfo.ca.gov/presscenter/newsreleases/NR50-07.PDF.

82. Press Release, Judicial Council of California, Commission for Impartial Courts Welcomes Comment on Judicial Election Proposals (May 7, 2009), available at http://www.courtinfo.ca.gov/presscenter/newsreleases/MA15-09.PDF. The Commission has already finished a draft final report and submitted it to the public for comment. JUDICIAL COUNCIL OF CALIFORNIA, COMMISSION FOR IMPARTIAL COURTS, RECOMMENDATIONS FOR SAFEGUARDING JUDICIAL QUALITY, IMPARTIALITY, AND ACCOUNTABILITY IN CALIFORNIA (2009), *available at* http://www.courtinfo.ca.gov/jc/tflists/documents/cic-finalreport.pdf.

83. *See supra* Part II.

84. *See, e.g.*, Amanda Bronstad, *L.A. Courts Face Layoffs, Closures If Budget Cuts Stand*, L.A. BUS. J., Jan. 26, 2004, *available at* http://goliath.ecnext.com/coms2/gi_0199-684356/L-A-courts-face-layoffs.html; Julie Shaw, *Court Official: Planned Cuts May Bring Closures, Risks*, PHILA. DAILY NEWS, Mar. 24, 2009, *available at* http://www.philly.com/dailynews/local/20090324_Court_official_Planned_cuts_may_bring_closures__risks.html.

Nationally, the impact of limited resources on court operations and access to justice has been dramatic. Courthouses in some states are closed for one or two days a week.[85] The number of judges and staff has not kept pace with rising populations and caseloads.[86] Even basic office supplies have gone wanting. The Constitution Project issued a report in 2006 summarizing some of the most serious cutbacks in state court services:

> Insufficient funding also led many courts to reduce the number and quality of important services that are in most states considered part of the judiciary's responsibility and budget, and particularly services for vulnerable litigants and litigants with special needs. Examples of such programs include foreign-language and sign-language interpreters, mediators for Alternative Dispute Resolution programs, guardian *ad litems*, counsel for indigent defendants, and other court-appointed specialists. Courts also had to limit or eliminate altogether important diversionary programs and specialized courts, such as domestic violence and drug treatment programs, and custody, drug, and other specialty courts, which many legislatures consider sensible public policy and have created to further important individual and societal benefits. Courts were also forced to raise case filing or "user" fees and add surcharges, leaving many people literally unable to afford to seek justice.[87]

California suffered courtroom closures in major cities and layoffs during budget crises in 1996 and 2003. In 1996, before

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85. THE CONSTITUTION PROJECT, THE COST OF JUSTICE: BUDGETARY THREATS TO AMERICA'S COURTS 6–7 (2006), *available at* http://www.constitutionproject.org/pdf/The_Cost_of_Justice_Budgetary_Threats_to_America's_Courts1.pdf; *see also* BOARD FOR JUDICIAL ADMIN., COURT FUNDING TASK FORCE, JUSTICE IN JEOPARDY: THE COURT FUNDING CRISIS IN WASHINGTON STATE (2004), *available at* http://www.courts.wa.gov/programs_orgs/pos_bja/wgFinal/wgFinal.pdf. *See generally* MICHAEL BUENGER, STATE COURTS AND STATE LEGISLATURES: A FUNDING CRISIS RENEWED, IN FUTURE TRENDS IN STATE COURTS 2008, at 68 (Carol R. Flango et al. eds., 2008), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/financial&CISOPTR=124.

86. *See* THE CONSTITUTION PROJECT, ACCESS TO COURTS, http://www.constitutionproject.org/issue.asp?id=310 (last visited Sept. 15, 2009) ("Our courts face further hurdles in meager budgets and diminishing financial support. In recent years, funding shortages have forced states to close courthouse doors, eliminate key supplemental programs, reduce the number of judges and court staff and decrease the number and quality of services for those with special needs, including foreign-language and sign-language interpreters.").

87. *Id.* at 3.

statewide trial-court unification and the shift in court funding from the county to the state level, budget reductions led to an uncoordinated reduction in courthouse hours, services, and staff in several of California's smaller counties.[88] However, a more coordinated approach occurred after court unification. In 2003, the judiciary's budget, which constitutes approximately 2 percent of the state's overall budget, received cuts of approximately $200 million. In Los Angeles, for example, twenty-nine courtrooms were closed.[89] Other counties including Alameda, San Francisco, Santa Clara, and Riverside reduced their courts' operating hours. Other courts, such as those in Solano, Yolo, Placer, and Sonoma, implemented staff furloughs.[90] Traffic and small claims courts were closed entirely in Moreno Valley, Corona, and Palm Springs.[91] All of this while caseloads continued to rise, resulting in increased delays throughout the system.[92] Access to justice clearly suffered. Even so, the response to this budget shortfall stood in marked contrast to that during the 1996 crisis. Because the trial courts were part of a unified state funding system,[93] the Judicial Council reacted to the 2003 crisis with a unified, central response. Budget allocations were coordinated among the trial courts, and the Judicial Council established a uniform basis for reducing courtroom hours.[94] As a result, the Judicial Council was able to mitigate some of the negative effects of the budget crisis on the public's access to the courts.

The current recession, the deepest of any in over fifty years,[95] is bringing its own set of cuts and challenges for California's courts. In the fiscal year 2009–2010 budget, substantial cuts affect the trial courts, the appellate courts, and the Judicial Council's operations and staff.[96] The total permanent and one-time cuts, as well as

88. *See, e.g.*, Laura Mecoy, *To Many, L.A. Stands for 'Layoffs Abound'*, SACRAMENTO BEE, Apr. 15, 1996, at A3.

89. THE CONSTITUTION PROJECT, *supra* note 85, at 4.

90. *Id.*

91. *Id.*

92. *Id.*

93. JUDICIAL COUNCIL OF CALIFORNIA, 2003 ANNUAL REPORT 2–3 (2003).

94. *See* ADMINISTRATIVE OFFICE OF THE COURTS, 2003 ANNUAL REPORT 21 (2003), *available at* http://www.courtinfo.ca.gov/reference/documents/ar2003.pdf.

95. Louis Uchitelle & Edmund L. Andrews, *Economy Slides At Fastest Rate Since Late 1950s*, N.Y. TIMES, Apr. 30, 2009, at A1.

96. Ronald M. George, Chief Justice, Cal. Supreme Court, State of the Judiciary Address to a Joint Session of the California Legislature (Mar. 10, 2009), *available at* http://www.court

unavoidable increased costs, may result in a deficit in the trial courts' budget of around $370 million (i.e., approximately 15 percent of the trial courts' current budget).[97] The true size of this budget shortfall will depend on how many significant issues are resolved. At a minimum, the cuts will delay funding for the new judgeships for several more years. Ultimately, the Judicial Council will have to decide how to reduce other expenditures in order to close the deficit. That will be a very difficult task because nearly three-quarters of the trial-court budget covers functions that cannot easily be reduced.[98] Reconciling those reductions with the overriding goal of preserving access to justice will occupy the Judicial Council's agenda for the coming year.

V. WHERE DO WE GO FROM HERE? RETHINKING EFFORTS TO ENHANCE ACCESS TO JUSTICE

Access to justice, broadly conceived, is subject to periodic pressure from cyclical economic downturns that affect government budgets and spending; however, access to justice is not a periodic issue. As explained above, access to justice must be more broadly conceived to encompass the wide range of structural factors that impact the California courts.[99]

Even in the best of financial times, Californians face significant limits on access to justice. Many of these barriers remain due to the judiciary's reactionary approach to managing large-scale, structural impediments. Confronting the full spectrum of access challenges

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info.ca.gov/reference/soj031009.htm#speech ("Serious challenges to the operation of our justice system remain. We await the determination of whether the trigger in the recently-enacted budget—based upon the receipt of federal stimulus funds—will be activated, restoring $100 million in the budget for the support of trial courts and another $71 million for new judicial positions. Failure to fill the $100 million hole in our budget would decrease the availability of services that are vital to the public and its access to the courts. It potentially could result in lay-offs and furloughs of court employees at some courts, in shortened hours of service, and inevitably in further delays in adjudicating cases.").

97. LEGISLATIVE ANALYST'S OFFICE, MAY REVISION OVERVIEW: JUDICIAL AND CRIMINAL JUSTICE 3 (June 2, 2009), *available at* http://www.lao.ca.gov/handouts/crimjust/2009/Overview_revision_criminal_justice_06_02_09.pdf.

98. For example, expenditures for criminal cases cannot easily be cut because of public safety concerns; expenditures for certain family law matters cannot be cut because the cuts would trigger substantial federal penalties that would exacerbate the budget gap; and expenditures for some high-volume courts that generate fees and fines cannot be cut because the fees and fines are much needed revenues.

99. *See supra* Part III.B.

will require making long-term changes, changes that can be made only if there is significant cooperation and coordination among California's co-reliant branches of government. Therefore, the question is not simply how the judicial branch and court leaders should respond to periodic crises but rather how the judiciary, both alone and in concert with the legislative and executive branches, should address the underlying structural restrictions on access to justice.

We do not purport to advance a prescription for curing all of the ailments affecting access to the judicial branch. Instead, we advocate a shift in how judicial leaders, policy makers, and other important stakeholders in the judicial branch approach access to justice issues. More specifically, we advocate a dual shift in how the judicial branch approaches problem solving, and how it views its relationships with its coequal and interdependent branches. We conclude Part V with a challenge for judges, judicial leaders, legislators, scholars, and lawyers to rethink how they approach issues of access to justice.

A. Refocusing Judicial Branch Problem Solving

As noted earlier, the California courts benefit when judicial leaders respond to long-term structural weaknesses in the branch with long-term structural reforms.[100] Trial-court unification and the shift from county to state trial-court funding has enhanced court flexibility and fiscal stability. The Judicial Council has evolved into a central governing body for the judicial branch and has placed a greater emphasis on long-range planning. In turn, these institutional changes have enabled the Judicial Council to respond more efficiently and effectively to access problems, such as the Riverside County Superior Court caseload crisis and the 2003 budget shortfall. In the context of the current budget crisis, we must not lose sight of the benefits of long-term solutions to fundamental problems. We must resist the temptation to focus only on the short-term crisis and short-term solutions.

Indeed, significant structural impediments are permitted to exist when the judicial branch loses this focus on structural and long-term solutions. Too often, the strategies employed, while perhaps helpful

100. *See supra* text accompanying notes 57–61, 82–86.

in responding to an immediate crisis, actually exacerbate long-term systemic problems. Instead of solving the long-term problem, we end up institutionalizing it and building it into baseline operations. [101]

This comes about because of the all-too-human tendency to seek out accommodations, particularly when a crisis or threat puts an organization into survivalist mode. Instead of keeping focused on long-term gains and requirements, which can be a lonely, difficult struggle, we look for short-term fixes. We engage in satisficing, a form of decision making that emphasizes selecting the first alternative that satisfies some minimal criteria, even though that alternative is not the optimal solution.

Unfortunately, when satisficing becomes the norm, short-term wins can actually create bad policies that frustrate or undermine long-term goals. For example, if faced one year with a short-term budget crisis, the legislature might (with the support of the judicial branch) raise fees and fines to address the crisis. That response, if practiced regularly in response to budget pressures, leads to increased economic barriers for low-income litigants and to inadequate and unstable funding. Similarly, during periods of economic boom, court leaders have implemented pilot programs to reduce barriers for self-represented litigants and to streamline complex litigation. [102] Yet these fledgling programs represent one-off responses to institutional problems and remain underdeveloped today.

Satisficing isn't always bad. Compromises are often necessary; however, to *always* or *routinely* resort to survivalist compromises results in long-term goals becoming essentially unattainable. Sometimes court systems need to resist satisficing to achieve more important strategic goals and objectives. The choices of when to resist compromise and when to accommodate, and the extent of an

101. *See supra* Part IV. Consider the following statement from Washington's Court Funding Task Force: "On all fronts, our system of justice in the trial courts is suffering a long and slow strangulation from lack of resources to the point where judges, attorneys, litigants, and the public no longer appreciate how an adequately funded system should operate." COURT FUNDING TASK FORCE, JUSTICE IN JEOPARDY: THE COURT FUNDING CRISIS IN WASHINGTON STATE 11 (2004).

102. *See* CTR. FOR FAMILIES, CHILDREN & THE COURTS, ADMINISTRATIVE OFFICE OF THE COURTS, CALIFORNIA COURTS SELF-HELP CENTERS 1–8 (2007), *available at* http://www.courtinfo.ca.gov/programs/equalaccess/documents/rpt_leg_self_help.pdf; ADMINISTRATIVE OFFICE OF THE COURTS, FACT SHEET: COMPLEX CIVIL LITIGATION PROGRAM 1–3 (2008), *available at* http://www.courtinfo.ca.gov/reference/documents/factsheets/comlit.pdf.

accommodation must be made with great sensitivity, discretion, and judgment, involving a full consideration of all of the pros and cons.

B. Rethinking Checks and Balances and Inter-Branch Relationships

Addressing the significant structural impediments that undermine access to the courts will require the judicial branch to work closely and effectively with its co-reliant branches of government. Cooperation between the three branches has produced significant progress in the California courts.[103] Indeed, without the support and assistance of California's legislators and governors, reforms like state funding and trial-court unification would not have been possible. These strong relationships have also yielded important gains in improving California's family law programs and expanding access to justice for self-represented and low-income litigants.

This tradition of inter-branch coordination should be strengthened to ensure continued collaboration on efforts to expand access to justice. More frequent dialogue between the branches, education about the roles and responsibilities of each branch, and improved data sharing can enhance the judiciary's partnerships with the legislature and the governor. Indeed, many scholars and policy makers suggest that courts improve communication with the political branches to secure legislative and executive support for judicial proposals.[104]

Although improving inter-branch dialogue and information sharing is an important component of any effort to expand access to the courts, it is not a sufficient strategy for addressing the underlying factors that permit restrictions on access to justice to exist in the first place. Nowhere is this more apparent than on the issue of judicial-branch funding. As we noted earlier, judicial underfunding is not

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103. *See supra* Part III.A.

104. *See, e.g.*, ABA, ROAD MAPS: FUNDING THE JUSTICE SYSTEM 12–13 (Aug. 1998); *see also* ROBERT W. TOBIN, FUNDING THE STATE COURTS: ISSUES AND APPROACHES 10–13 (1996); James W. Douglas & Roger E. Hartley, *Making the Case for Court Funding: The Important Role of Lobbying*, JUDGES' J., Summer 2004, at 35, 36–37 [hereinafter Douglas & Hartley, *Making the Case*]; Roger E. Hartley & James W. Douglas, *Budgeting for State Courts: The Perceptions of Key Officials Regarding the Determinants of Success*, 24 JUST. SYS. J. 251, 260 (2003) [hereinafter Douglas & Hartley, *Budgeting for State Courts*].

something that happens only during recessions and budget crises. It is a chronic problem.

Consequently, some scholars and judges believe the judiciary should assert its inherent power to compel funding from the political branches.[105] Indeed, courts claiming such an inherent power have even pursued litigation against legislative and executive branches to mandate greater appropriations.[106] Such suits are rare and often involve individual courts and political bodies at the county or city level. Nevertheless, the inherent-power argument places the judiciary in direct conflict with the other two branches, raising profound questions of constitutional authority.

More common than the inherent-power argument is the case for greater political engagement by the judicial branch. However, in addition to the problem that routinely made accommodations can compromise long-term goals, fully engaging in the rough-and-tumble of the political process also carries with it serious structural separation-of-powers risks. Some scholars and commentators advocate more aggressive politicking by the judicial branch and propose various traditional lobbying strategies to help the judicial branch achieve its policy and fiscal goals.[107] These strategies include, among other things, developing close personal contacts with

105. *See generally* Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1049 (2004) ("The judiciary must, therefore, be wise and restrained in the exercise of inherent powers. Although courts have the inherent power to compel funding, the impact of exercising that authority m may have wide-ranging ramifications, affecting not only the relationship between the judiciary and the other branches, but also the judiciary's legitimacy in the eyes of the public."); Michael L. Buenger, *The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687 (1983); Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111 (1994); Walter E. Swearingen, Note, *Wachtler v. Cuomo: Does New York's Judiciary Have an Inherent Right of Self-Preservation?*, 14 PACE L. REV. 153 (1994).

106. Most notably, in 1991 the Chief Justice of New York sued the state's then governor, Mario Cuomo, asserting that the judiciary had the inherent power to compel funding for a co-equal branch of government. The case was settled out of court. Anemona Hartocollis, *New York's Top Judge Sues Over Judicial Pay*, N.Y. TIMES, Apr. 11, 2008, at B3; Justin S. Teff, *The Judges v. the State: Obtaining Adequate Judicial Compensation and New York's Current Constitutional Crisis*, 72 ALB. L. REV. 191, 194 (2009); *see also* Lavelle v. Koch, 617 A.2d 319, 320 (Pa. 1992) (mentioning order compelling disbursement of "reasonable and necessary funding" to the Carbon County Court); Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971) (recognizing inherent authority of judiciary to compel payment of reasonable and necessary funds).

107. *See, e.g.*, Douglas & Hartley, *Making the Case*, *supra* note 104, at 36–37; *see also* Roger E. Hartley, *State Budget Politics and Judicial Independence: An Emerging Crisis for the Courts as a Political Branch*, CT. MANAGER, 2003, at 16, 20.

key legislators, building coalitions, utilizing professional lobbyists, and, if necessary, taking an issue directly to the public. According to these commentators, the alternative to increased political engagement is continued judicial underfunding. As James Douglas and Roger Hartley argue, courts "may still be selling themselves short by playing the political game too conservatively." [108]

There are major risks inherent in this engagement with political processes, and the risks all come down to the same issue: if you play on the political field, you must expect to be treated as a full-fledged political player and to be subject to the same rules of political engagement. In politics, it is common to retaliate against enemies, to find oneself in the middle of crossfire between different groups (such as labor and big business), and to be used as a political football in partisan political battles. The judiciary also runs the risk of being caught in the middle of budget battles between the legislative and executive branches. As former U.S. Supreme Court Chief Justice William H. Rehnquist warned, "There is simply no reason for depriving the public of any part of the function which the judicial branch performs because of disputes between the executive and legislative branches with respect to other agencies included in the larger appropriation bill." [109]

Ultimately, there is also a risk that the public will start to view the judiciary with the same skeptical eye that it views all participants in the political process, and this places the public's trust and confidence in the judiciary and the judiciary's claim to impartiality at risk.

To minimize this risk of being tagged as just another special interest, the judiciary may be wise to approach inter-branch relations from an entirely different perspective. Court leaders and policy makers need to have a candid conversation about the underlying assumptions governing the judiciary's relationship with the political branches. It is both appropriate and desirable that the political branches provide a check on the judiciary, just as the judicial branch provides a check on the legislative and executive branches. Indeed, this is the very essence of our tripartite system of mutually

108. Hartley & Douglas, *Budgeting for State Courts*, *supra* note 104, at 260.

109. Chief Justice William H. Rehnquist, *1995 Year-End Report of the Federal Judiciary*, 19 AM. J. TRIAL ADVOC. 491, 492 (1996).

accountable, interdependent branches of government. But the judiciary cannot remain so dependent on the political branches that its only options for asserting its status as a coequal branch are to risk losing the public's trust and confidence or to forgo adequate resources.[110]

The legislature's power over the purse is an increasingly prominent dimension of checks and balances, especially with regard to the legislature's relationship with the judicial branch. Structured this way, funding is directed towards political priorities, making the judiciary vulnerable to political manipulation and legislative retaliation. According to Michael Buenger, "the budget has become one of the legislatures' chief tools for expressing dissatisfaction" with judicial decisions.[111] Indeed, just last year, members of the California State Assembly tried unsuccessfully to block a $5 billion plan to upgrade the state's courthouses in response to the California Supreme Court's rulings on same-sex marriages and parole eligibility.[112]

We encourage leaders of all three branches to move beyond simple "checkbook" accountability for the judiciary and to consider new ideas for holding the judicial branch accountable without threatening its independence. Performance reviews and public feedback mechanisms offer one example of an alternative approach to judicial accountability. Turning the focus to long-term solutions and issues will be possible only if the judiciary can clearly

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110. Due to a substantial decrease in the number of lawyers elected to the California State Legislature, this candid conversation may be more necessary now than has historically been true, at least in California. In 1971, almost half of California's legislators were lawyers, and most legislative leaders were lawyers. *See* Diane Curtis, *Fewer Lawyer-Lawmakers: Does It Make a Difference?*, CAL. ST. B.J., Mar. 2009, *available at* http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/March2009&sCatHtmlPath=cbj/2009-03_TH_01_legislature.html&sCatHtmlTitle=Top%20Headlines. Today, lawyers make up only 18 percent of the legislature (21 out of 120). *Id.* ("Assembly Member Dave Jones, D-Sacramento, a lawyer and former chair of the Assembly Judiciary Committee, says the declining number of lawyers in the legislature 'has had a big impact on the legislature's support for and understanding of the judicial branch and the civil and criminal justice systems.' That lack of understanding has led to inadequate resources for the courts, he said. . . . In earlier legislatures, he says, when there were more lawyers, there was an immediate understanding of the need to provide adequate funding for the judicial branch. 'It's a lot harder now,' he says.")

111. BUENGER, *supra* note 85, at 70.

112. Nancy Vogel & Patrick McGreevy, *GOP Fails to Block Plan to Upgrade Courthouses; Assembly Republicans Criticize the State's Top Judge for Rulings on Same-Sex Marriage and Parole for Murderers*, L.A. TIMES, Aug. 30, 2008, at B3.

demonstrate that it holds itself publicly accountable for disciplined, responsible short-term management of branch operations. Courts should fully embrace public performance measures that identify both the strengths and weaknesses of current operations and that can be used to make sensible budget-allocation decisions. The judicial branch needs to make a commitment to transparent governance and fiscal credibility. This is how public trust and confidence can be developed. Further, it is such trust and confidence (more than any short-term lobbying tactic or advantage) that will serve the judicial branch well in dealing with its sister branches of government.

In 1995 the National Center for State Courts published the Trial Court Performance Standards and Measurement System.[113] These standards measure court performance along five dimensions: (1) access to justice; (2) expedition and timeliness; (3) equality, fairness, and integrity; (4) independence and *accountability*; and (5) public trust and confidence.[114] These standards provided the foundation for the development of CourTools, a set of ten trial-court performance metrics designed to help state courts demonstrate "effective stewardship of public resources."[115] Performance review measures like CourTools can "demonstrate public accountability and sound management of the judiciary as a public institution."[116] This notion of alternative forms of accountability achieved through public feedback echoes James Madison's theory that "[a] dependence on the people is, no doubt, the primary control on the government; . . . experience has taught mankind the necessity of auxiliary precautions."[117] At the very least, performance review systems merit

113. BUREAU OF JUSTICE ASSISTANCE, FACT SHEET, U.S. DEP'T OF JUSTICE TRIAL COURT PERFORMANCE STANDARDS AND MEASUREMENT SYSTEM, (1995), *available at* http://www.ncjrs.gov/pdffiles/tcps.pdf.

114. *Id.*

115. NAT'L CTR. FOR STATE COURTS, IMPLEMENTING COURTOOLS: GIVING COURTS THE TOOLS TO MEASURE SUCCESS (2005), http://www.ncsconline.org/D_research/CourTools/Images/CourToolsOnlineBrochure.pdf.

116. BUENGER, *supra* note 85, at 70; *see also* INST. FOR CT. MGM'T, COURTS AND THE PUBLIC INTEREST: A CALL FOR SUSTAINABLE RESOURCES 11–12 (2002), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctcomm&CISOPTR=31; Daniel J. Hall et al., *Balancing Judicial Independence and Fiscal Accountability in Times of Economic Crisis*, JUDGES' J., Summer 2004, at 5, 8–9, *available at* http://www.abanet.org/jd/publications/jjournal/2004summer/hall_etal.pdf; John K. Hudzik & Alan Carlson, *State Funding of Trial Courts: What We Know Now*, JUDGES' J., Summer 2004, at 11, *available at* http://www.abanet.org/jd/publications/jjournal/2004summer/hudzik_carlson.pdf.

117. THE FEDERALIST NO. 51, at 286 (James Madison) (E.H. Scott ed., 1898).

further consideration by court leaders and policy makers to help them begin to think anew about how the judiciary can be held accountable to, but remain independent of, the other two branches.

Rethinking checks and balances is essential if the underlying structures restricting access to justice are to be eliminated. All too often, the concept of checks and balances means nothing more than the most recent audit or budget hit piece. Attention is directed to small issues that play well with the mass media or the blogosphere, while complex conversations about large, strategic investments and governance seldom occur. The judicial branch must be accountable for its management and provision of access to justice; however, accountability should not mean oversight of every judicial-branch decision, nor should it be limited to "checkbook supervision." Increased dialogue and communication between the judiciary and the political branches will help. But the conversation needs to address the fundamental concepts underlying judicial accountability and independence.

C. The Call for Further Engagement by Judicial Branch Allies and Stakeholders

A major premise of our recommended approach to improved inter-branch relationships is that the courts will be much better off in the long run if they generally limit their legislative and executive branch interactions to educational advocacy on the merits and generally eschew more overtly political forms of lobbying. Some might contend that this approach will ultimately disadvantage the courts in advocating for resources in the rough-and-tumble world of real politics. However, we believe that the courts can still have an effective voice in legislative deliberations about court-administration issues so long as three additional conditions are met: (1) the legislative and executive branches must generally reciprocate the judiciary's approach and try to avoid taking advantage of the self-imposed limitations on judicial advocacy; (2) key stakeholders must reinforce for the legislative and executive branches that decisions affecting access to the courts are best made in a largely nonpartisan and apolitical environment; and (3) the courts themselves must embrace transparency and accountability for their management of public resources in exchange for stakeholder support and legislative- and executive-branch respect.

In short, the deal to be struck is greater court transparency and accountability for judicial management in return for a less politically charged environment for legislative and executive decision making about resources that affect access to the courts. In our judgment, this deal can be struck and maintained successfully if it is constantly reinforced by active stakeholder engagement. This does not mean all stakeholders must agree with every court recommendation. Rather, it means that stakeholders must commit themselves to a more nonpartisan approach to court access issues by pursuing advocacy within the executive and legislative branches.

This change in attitude and behavior will not come about by itself. The entire legal community, including law schools, legal scholars, practicing lawyers, the organized bar, judges and courts, and the judiciary's key stakeholder groups, must commit themselves to a concerted program to change the way issues of judicial administration are discussed, debated, and resolved by the political branches. As evidenced by the following discussion of necessary steps, there is much work to be done to achieve this goal.

1. Reframing the Discussion in Terms of Access to Courts

Long-term resource issues confronting the courts, including insufficient and unstable funding for judgeships, courthouse construction and maintenance, and general court operations, should be seen as impediments to public access to courts rather than simply as challenges to judicial independence.

Legal scholars should reframe the discussion by expanding the access to justice scholarship beyond access to counsel in order to encompass access to a justice system that has sufficient resources to resolve disputes in a timely manner. Scholars should reach out to state-court administrative offices and to state-court chief justices for assistance in gathering information for this scholarship.

Judicial leaders should similarly reframe their own discussions about judicial independence to encompass the theme of public access to impartial courts.

2. Reinforcing Nonpartisan Consideration of Issues of Judicial Administration

When it comes to making resource decisions involving the courts and access to the courts, the executive and legislative branches should consider issues on the merits without regard to partisan, ideological, or political forces.

Governors and legislative leaders should publicly declare a nonpartisan approach to considering issues of judicial administration and resource allocation.

Key stakeholders in court processes (including the state bar, prosecutors and defense counsel, business and labor groups, the civil plaintiffs' and defense bar, and law school deans and professors) need to support nonpartisan consideration of access to court issues and vocally defend courts against legislative or executive actions that threaten to politicize the judicial branch or undermine its independent decision-making processes.

Legal professionals and bar associations can help courts in the political arena by articulating the judiciary's objectives without exposing the judicial branch to political manipulation. Indeed, lawyers and bar associations make up the judiciary's natural constituency and should be encouraged to view themselves this way.[118]

Legal scholars can focus some of their attention upon the implications for separation of powers, judicial independence, and access to courts of partisan versus nonpartisan processes by which governors and legislators evaluate measures dealing with the administration of justice, including requests for resources.

3. Promoting Greater Transparency and Accountability in Court Management

Courts need to embrace transparency and accountability in their own stewardship and management of public resources so that governors and legislators can develop confidence and trust in the idea that resources placed in the hands of the courts will be carefully handled in the public's best interest.

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118. ABA, *supra* note 104; *see also* Tobin, *supra* note 104, at 81–87 (discussing generally how to build a broader judicial constituency).

Chief justices, trial-court presiding justices, and other court leaders must publicly commit themselves to full transparency in court management and operations and to accountability for meeting performance measures.

At a national level, the American Bar Association ("ABA") can help by reemphasizing the importance of its Trial Court Performance Standards and Measurement System and by promoting the implementation of those standards in the National Center for State Courts' CourTools program.[119] The ABA should boldly call on governors and legislators to respect and support the public value of these performance standards by linking implementation of performance measures to budgets.

At a state level, state, local, and specialty bar associations should play a similar leadership role. Sustained advocacy on behalf of the judiciary by the legal community will help the judicial branch achieve further institutional reform and minimize political risk to the courts.

VI. CONCLUSION

There is a pathway to improving access to justice—a pathway to securing adequate, appropriate, and stable resources and support for the justice system—that harmonizes judicial independence and respect for separation of powers with public accountability for the management of public resources. We do not purport to know precisely where that path lies or how it should be traveled. Rather, we challenge judicial leaders, policy makers, scholars, and the public to think more broadly about access to justice. Reframing the very concept of access to justice is a crucial first step in developing long-term structural improvements to the California court system.

In order to reshape our conception of access to justice, courts must first do their part. The judicial branch needs to refocus its attention towards institutional reform, and it must resist the temptation to implement short-term solutions to long-term problems. Judicial leaders must engage with the executive and legislative branches at a strategic level about the nature of inter-branch accountability. Although improving the judicial branch's relationships with the political branches is a necessary part of any

119 *See supra* text accompanying notes 113–116.

effort to reduce barriers to justice, it is not a sufficient strategy for improving the broad conception of access to justice outlined above. There are substantial risks if we stay on our current course. Traditional political engagement with the executive and legislative branches, which involves pursuing a greater share of the budget pie through ordinary lobbying, presents threats to judicial independence and to the maintenance of the public's trust and confidence in the courts. Moreover, the courts' historic practice of satisficing—or as former House Speaker Sam Rayburn used to say, "you've got to go along to get along"—results ultimately in making resource scarcity the new norm.

Court leaders and policy makers from all three branches should instead have a serious conversation about the underlying concepts that govern issues of accountability and independence of the judicial branch. Included in this conversation should be a candid discussion about accountability mechanisms that move beyond the legislature's power of the purse, such as performance-review measures. Such measures would not only cover the broad range of court operations but would also define court-performance and accountability measures in terms of outcomes rather than focusing narrowly on inputs and outputs. By focusing on outcomes, performance and accountability measures would move beyond traditional measures of court performance, such as time standards for case disposition and caseload-clearance rates, and would begin to address more substantive questions of justice. Such issues include giving litigants a chance to be heard when they have their day in court, reducing the rates of recidivism for offenders who attend drug court, ensuring permanence and safety of children in the dependency system, or simply meeting statutory requirements of oversight to ensure the rights of the incapacitated elderly who are the subjects of conservatorship proceedings. Each of these would be a hallmark of courts that provide access to justice in a truly meaningful way.

This conversation has the potential to lead to a more nuanced understanding of how separation of powers and judicial independence mesh with accountability. That understanding will be critical to establishing more stable and adequate resources. The executive and legislative branches cannot be expected to simply hand over the keys to the treasury without assurances of accountability regarding the public value to be gained by investments in the

judiciary. The courts need to prove that they will be disciplined stewards of the public's money.

In closing, we acknowledge that the path we are proposing is itself somewhat novel. But continuing down the same path we have been traveling is sure to lead to more limited access to justice than the public deserves. The challenges affecting California's access to justice are not insurmountable. Constructively engaging the executive and legislative branches at a more strategic level, with a promise of accountability for implementation on the ground, has the potential to reframe in a positive way what has now become a dreary and dangerous cycle of short-term fixes and political maneuvering—a cycle that undermines access to justice.