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Rethinking the Delivery of Justice in a Self-Service Society

Michael L. Buenger*

I. INTRODUCTION

There is little debate that American society has undergone monumental changes in the last thirty-plus years. Societies, of course, are always changing. But now, the speed and span of change can be disorienting, challenging long-established traditions, institutions, understandings, norms, and ideas at their very core. Much of the change today has been enabled and compelled by breakthroughs in information technology. Rapid advances in technology are driving new ways of relating to one another, creating entirely new industries, challenging old “market” occupants, breaking down geographical barriers, opening prospects for greater self-service, disrupting social, political, and economic orders, and recalibrating public expectations of institutions, both old and new.

The famous Canadian philosopher Marshall McLuhan noted that “As technology advances, it reverses the characteristics of every situation again and again. The age of automation is going to be the age of ‘do it yourself.’”¹ Futurist Ray Kurzweil observed that the human brain is “hardwired” to think about the future in linear terms, while the impacts of information technology are exponential.² “Thirty steps linearly, that’s our intuition, gets us to 30. Thirty steps exponentially—2, 4, 8, 16—gets us to a billion.”³ Five of the six most valuable companies in the world occupy the information technology space, with the oldest of those five companies, Microsoft, being founded in 1975.⁴ Exponential change is all around us, and it is not limited to the evolution of computing power or the development of new apps that connect people in new ways. Exponential change is occurring across a range of matters, reshaping relationships, our expectations of institutions, core social and legal values, and even our traditional understanding of the foundation of the public justice system. So how does the public justice system, a traditionally linear institution, keep pace with a society undergoing exponential social change? One way might be to rethink what it means to go to court by, for example, broadening and integrating various dispute resolution services into the

* Executive Vice-President, National Center for State Courts. This Essay was adapted from a 2019 Keynote Address given at the American Bar Association Court ADR Conference. See John Lande, *Michael Buenger’s Great Keynote Address at the ABA Court ADR Conference*, INDISPUTABLY BLOG (Apr. 21, 2019), <http://indisputably.org/2019/04/michael-buengers-great-keynote-address-at-the-aba-court-adr-conference/>.

1. ERIC MCLUHAN, *THE ESSENTIAL MCLUHAN* 272 (Frank Zingrone ed., 1st ed. 1997).

2. Adam Ludwig, *Ray Kurzweil on Using Exponential Thinking to Predict the Future*, FORBES (Nov. 9, 2012), <https://www.forbes.com/sites/teconomy/2012/11/09/ray-kurzweil-on-using-exponential-thinking-to-predict-the-future/#4831fb83546b>.

3. *Id.*

4. Joe Svetlik, *From DOS to Windows: How Microsoft Became One of the Most Valuable Companies on Earth*, BT (Feb. 25, 2019), <https://home.bt.com/tech-gadgets/computing/history-of-microsoft-how-it-became-valuable-and-successful-11364045249599>.

court process to expand access to the justice system while also diversifying how we assist people in resolving their disputes.⁵

If one were to look up the term “alternative” in the Merriam–Webster dictionary, one would find definitions such as “different from the usual or conventional” or “existing or functioning outside the established cultural, social, or economic system.”⁶ “Alternative” suggests something *other than*; perhaps a lesser thing, perhaps even the thing you do because you cannot do the ideal. It can easily be cast in a pejorative manner. The term is binary in tone just as it is binary in effect. I suggest that part of an effective response to exponential social change rests in transitioning our language, programs, and systems away from notions of “alternative” dispute resolution and toward a more encompassing and holistic notion of dispute resolution services offered by the courts. A menu of options, if you will, not defined in terms of alternatives but defined by litigant needs, offering multiple ways for people to meaningfully interact with the public justice system to produce sustainable outcomes for human disputes.

Why is this so important? The Preamble to the United States Constitution begins, “We the people in order to.”⁷ This is followed by three important objectives: “form a more perfect Union, establish Justice, insure domestic Tranquility.”⁸ These objectives come before addressing the common defense and providing for the general welfare. And, of these three pressing objectives, I would argue, as did James Madison,⁹ that establishing justice is the lynchpin, the foundation, the bedrock, for every other objective of government and civil society. So important was this notion of establishing justice that it became an intense point of contest and argument in the ratification debates.¹⁰ Madison recognized the importance of establishing justice as *the* central theme of the Constitution when he wrote in Federalist 51:

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . Justice is the end of government. It is the

5. While much of the debate on incorporating other forms of dispute resolution in the adjudicatory process occurs within the context of access to civil justice, I would argue that state courts have been far more progressive and aggressive in diversifying adjudicatory approaches in the criminal context. State courts have implemented a wide range of “problem-solving” techniques to address substance abuse, human trafficking, mental health, veterans’ issues, juvenile issues, family dependency, and so forth. NAT’L CTR. FOR STATE COURTS, <https://www.ncsc.org/Topics/Alternative-Dockets/Problem-Solving-Courts/Home.aspx> (last visited Dec. 10, 2019). In each of these specialized court processes, the judge plays an integral role leading a problem-solving team dedicated to helping litigants overcome underlying challenges and achieve other goals such as reducing recidivism. Douglas Marlowe, *The Verdict on Drug Courts and Other Problem-Solving Courts*, 2 CHAP. J. CRIM. JUST. 53, 67 (2011); Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 755 (2008); Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 531 (1999).

6. *Alternative*, MERRIAM–WEBSTER, <https://www.merriam-webster.com/dictionary/alternative> (last visited Dec. 10, 2019).

7. U.S. CONST. pmb1.

8. U.S. CONST. pmb1.

9. The Federalist No. 51 (James Madison).

10. Anti-Federalist No. 81 (Brutus).

end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.¹¹

To state the obvious, lawyers, judges, and courts get a bad rap at times. Some of it is deserved. Some of it is not. But if we could step back and gauge our actions against Madison's wise words, there is no more noble pursuit and necessary cause in this world today than establishing justice. This is why I think we need to have a discussion about what it means to deliver justice today in a world of growing virtual relationships defined by boundlessness, not boundaries.

How are we, in the courts, going to achieve the goals of establishing justice, protecting core values, and remaining relevant in this increasingly physically-disconnected but virtually-interconnected world? How will we understand and then translate our own expectations about interacting with institutions to the public justice system? How will we help people navigate the complexities of human disputes at a time when many people see physicality and institutionalism as calcified and constraining concepts? The virtual world, even with all its faults, is creating new expectations, launching new ways of relating, and opening new opportunities for services. Where are we, the courts, in adapting to exponential changes in our society and in public expectations?

The title of my Essay is "Rethinking the Delivery of Justice in a Self-Service Society." There are several themes in this title. There is the theme of "delivery of justice." We might call this the "what," the ultimate objective. There is the theme of "self-service." We might call this the "how," the means. There is the theme of "society." We might call this the "who," the context. But these themes are qualified by the theme of "rethinking." In other words, "rethinking" is the exercise of suspending our deeply held assumptions and beliefs about a topic to test their continued validity and relevance in light of new information or emerging trends.

I hope to do a few things through this Essay. First, I would like to outline what I see as some of the challenges facing those of us who work in the courts, which we might refer to as the established public justice system. I make a distinction between the *public* justice system and emerging *private* justice systems. I believe we are in an increasingly competitive industry—the industry of dispute resolution—and, to be candid, I do not think we compete all that well at times, in no small measure because of our beliefs and assumptions and thinking. As Erika Rickard has observed, the American judiciary is anchored in 325 years of tradition, producing a procedural system that rests on three presumptions: fully represented parties; limited technological needs; and low case volumes.¹² Whether these presumptions remain valid is under considerable scrutiny as more and more people seek self-service interaction with systems and institutions. Second, I would like to provide a framework for thinking about these challenges. The difficulty in rethinking highly complex and sophisticated systems, even in the face of exponential environmental changes, is that those of us in the system can easily become captives of the system. I think we need to ask this singularly important question: Do we have a public dispute resolution system designed for the needs and expectations of the Twenty-First Century? I think the answer to that is generally "no," but that solutions to the

11. The Federalist No. 51 (James Madison).

12. Erika Rickard, *The Agile Court: Improving State Courts in the Service of Access to Justice and the Court User Experience*, 39 W. NEW ENG. L. REV. 227 (2017).

question may lie in the past as well as in the present. Third, I would like to ask some questions and offer some thoughts on moving forward.

Admittedly, courts are large, complicated systems that can neither be explored nor re-engineered in ten pages. What I hope, however, is that I can provide some encouragement to rethink and redesign some of the core services, structures, and procedures that we rely upon—perhaps too much—because they are known, convenient, and routine to those of us in the system. What I will offer is not groundbreaking; we have talked about it for years. But we have, in my estimation, made little progress towards significant change because we have been unwilling or unable to make the intellectual, financial, and institutional investments necessary. We have generally played at the edges. We have not looked too deeply into the core and its assumptions.¹³

As you read, keep in mind the following themes introduced above: (1) how fast times are changing; (2) how innovation is constantly reshaping our world; (3) how much “self-service” we increasingly engage in every day; and (4) that nothing is inevitable. Institutions either adapt or they fail themselves out of existence. Furthermore, I think it is only fair to disclose to you that I suffer from some strong opinions. My views have been shaped by working in various state courts and with the courts of other countries for some thirty years. When I consider my experiences against the rapidly changing landscape of public expectations, I fear that our public justice system is rapidly becoming beyond the reach of most people, not simply in terms of finances, but also in terms of relevance. What this may well mean is that our nation’s justice systems will become a two-tiered system defined by haves and have-nots, by those who can afford justice and those who will simply be stuck with an underfunded, calcified, and increasingly obsolete public system.

II. CURRENT CHALLENGES

Many of my current opinions, shared here, were shaped by the three years I spent in Kosovo and my work with other judicial systems struggling to establish justice. As some may recall, the Kosovo War of 1998–1999 was the last formal armed conflict stemming from the collapse of the former Yugoslavia in the 1990s.¹⁴ Like most civil wars, the very fabric of a society was ripped apart along with its governing institutions. To stabilize Kosovo and the wider Balkans, the United States, together with the United Nations, the European Union, and other international partners, committed significant resources to the region.¹⁵ A substantial part of that commitment was to promote the rule of law and to establish a truly independent judiciary able to re-instill public confidence in the fair

13. I would argue that the need to look deeply into the “core” of our legal system extends to legal education as well. Notwithstanding great strides in providing law students with a diverse understanding of dispute resolution approaches, much of legal education remains focused on training students for the eventual courtroom battle when, in fact, as the late Attorney General Janet Reno once observed, “Most lawyers, even trial lawyers, don’t get their problems solved in a courtroom.” *Janet Reno Quote*, BRAINY QUOTES, https://www.brainyquote.com/quotes/janet_reno_787256 (last visited Dec. 10, 2019).

14. See generally TIM JUDAH, *KOSOVO: WAR AND REVENGE* (2000); NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* (1998); JULIE A. MERTUS, *KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR* (1999); DAVID L. PHILLIPS, *LIBERATING KOSOVO: COERCIVE DIPLOMACY AND U.S. INTERVENTION* (2012).

15. See generally David Schleicher, *Liberal International Law Theory and the United Nations Mission in Kosovo: Ideas and Practice*, 14 TUL. J. INT’L & COMP. L. 179 (2005).

administration of justice. I lived and worked in Kosovo from 2007 to 2010 on a project dedicated to achieving those outcomes. My time there taught me three valuable lessons.

First, and most importantly, I learned from my experiences that the breakdown of social order, political stability, and economic well-being of a community is vastly accelerated by a breakdown in the public's confidence in the fairness and capabilities of a justice system. This is why I believe in strong, effective, independent courts that are focused on public service, helping people resolve their differences peacefully, protecting the rule of law, and rendering justice fairly and objectively. This is why I believe we must build capacity and expertise in the courts and innovate to meet the changing needs of society. And this is why I think it is our responsibility to periodically suspend our confidence in the perceived perfection of our system of justice and ask penetrating questions of it to ensure its continued relevance to the public.

When people perceive the justice system is tilted, unfair, unresponsive, more concerned with mechanics than substance, outputs more than outcomes, its own survival rather than its relevance, then communities are weakened, not strengthened. While there were many factors that contributed to the descent of Kosovo into civil war in the 1990s, one of the most important factors was, in my opinion, the collapse of the public's confidence in the fairness of the justice system and the rule of law. Quite simply, there was a "sense," a "perception" among a large part of the population, that the system was stacked. There was little use in going to court to seek justice because the courts were nothing more than an arm of government dedicated, in the end, to protecting the government, not the rule of law. As confidence in the independence and fairness of the justice system collapsed, so too did confidence in governing institutions broadly. This then accelerated the collapse of other government systems, and then the Kosovar society generally. We tend to think that societies disintegrate gradually. On the contrary, the former-Yugoslavia descended into civil war, ethnic cleansing, and a return to "Balkanization" in just ten years.

The need for public confidence in the justice system is particularly acute in a democracy like ours because compliance with norms and rules is largely voluntary. We generally expect people to comply, not simply because there are consequences for non-compliance, but also because people believe those consequences are fairly and competently administered. Courts are important institutions in this exercise not simply because they are places to resolve disputes peacefully, but also because they are important symbols of stability, service, objectivity, factual judgment, expertise, and fairness. They are anchors for a healthy, peaceful, and vibrant society that can resolve its differences without resort to warfare or violence. Therefore, no matter what role we play in these institutions, there is always a wider dimension to our actions. We either contribute to or detract from the public's faith in the system. And each little contribution or detraction either builds or erodes confidence in all systems of government.

Second, I learned that law, courts, notions of legality, and systems of dispute resolution reflect certain cultural understandings, customs, and social thinking. These then drive institutional design and institutional processes. The decisions we make or assumptions we rely upon to form norms, procedures, processes, and institutions are more a reflection of culture than a universal understanding of what the optimal system of justice should be, or what it should look like. Not every

culture or nation prefers a complex adversarial system of justice with intense procedures overseen by detached and neutral magistrates as its initial approach to resolving differences. That approach to dispute resolution is culturally driven; it is not ordained from on high. In Australia, for example, families who have a dispute about children must make a genuine effort to resolve their differences through a community-based family dispute resolution process before seeking parenting orders from a court.¹⁶ And in Sweden, there is a strong presumption in favor of negotiations to resolve labor disputes, and legal proceedings before the Labour Court are viewed only as a last resort.¹⁷

To be clear, there may be good reasons for a system generally designed around an adversarial model. Such a system may, in many circumstances, be more capable of protecting some core principles that we know are important in building a more just society. Principles such as separation of powers, due process, equal protection, and the independence of judgment. But ultimately, how these principles are actualized and protected can be highly variable, driven by history, experience, and culture.

This leads me to my third lesson: People who live, work, and are comfortable in highly complex, sophisticated systems can become prisoners of those systems. We assume that there is no need to revisit fundamental questions of system design because things seem to be working so well (for us, at least). We engage in the defense, not the questioning, of archetype or prototype thinking. Martin Shapiro, the author of the book “Courts: A Comparative and Political Analysis,” observed that most people believe that the prototypical court reflects the following elements: (1) an independent judge; (2) applying pre-existing legal norms; (3) after adversarial proceedings; (4) to achieve a purely dichotomous decision in which one party is assigned right and the other wrong.¹⁸ Yet, he also noted that such a prototype does not really exist in any pure form. It probably cannot exist in a pure form if justice is to be obtained. Like people, human disputes are simply *not* prototypical. They are extremely variable even when the underlying legal theory is the same. Who would remotely consider asserting that there is a prototypical child custody case, a prototypical personal injury case, or a prototypical guardianship case? If human disputes were prototypical there would be no need for courts or discretion or the exercise of human judgment.

Nevertheless, our thinking tends to gravitate to prototypes and their procedures as standard measures for success. As systems of justice become more sophisticated, more prototypical, we develop more and more rules and procedures as indicators of success, efficiency, and objectivity. We see things in highly procedural terms, procedures that were initially designed to protect certain values but have become, in some circumstances, self-reinforced thinking and rote actions. There is little regard for the questions: Do we really need to do it this way? Is there a better way to do it? We become captives in the pursuit of outputs that are easily quantified,

16. See Lawrie Moloney, *From Helping Court to Community-based Services: The 30-Year Evolution of Australia's Family Relationship Center*, 51 FAM. CT. REV. 214 (2013) (noting that 2006 legislative changes to Australian family law sought to promote a family dispute resolution system that was less court-centric and legalistic by mandating the use of community-based mediation as a pre-condition to formal court proceedings).

17. Giuseppe De Palo & Mary B. Trevor, *Swedish Summer: Last Month's New Mediation Act Sets the Stage for Advancing Conflict Resolution Practice*, 29 ALT. TO HIGH COST LITIG. 147 (2011) (noting that people in Sweden are generally consensus-seeking, which fosters a long tradition of mediating disputes).

18. See generally MARTIN M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1986).

not the sustainability of outcomes, which is a far more difficult and elusive measure of success. And we convert facilitators and decisionmakers into umpires, analogizing our actions and our systems to sporting events and games.

The problem with these assumptions, with this prototypical thinking regarding a purely adversarial approach to dispute resolution, was perhaps best summed up by Roscoe Pound over one-hundred years ago. You have probably heard this before, but it bears repeating nevertheless:

[I]n America we take it as a matter of course that a judge should be a mere umpire . . . and that the parties should fight out their own game in their own way without interference . . . The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he [or she] is merely to decide the contest . . . according to the rules of the game, not to search . . . for truth and justice. . . . The inquiry is not, What do substantive law and justice require? Instead, the inquiry is: Have the rules of the game been carried out strictly?¹⁹

In a society that has increasing expectations for self-service, for simplicity in their interaction with systems large and small, this focus on procedural formality, on the rules of the game at the expense of other, more substantive objectives, becomes a real stumbling block and point of frustration for many.

If we suspend our beliefs and deeply consider our public justice system, we probably would admit that not much has really changed since Pound's 1906 speech. This notion of courts serving merely as forums for a game overseen by umpires continues to have an unfortunate hold on the institution of the courts, on our own thinking, and on the politics of our age. It is as if the more detached and procedurally intense we can become, the better we will be at judging others or solving their problems. But as you may know from working in the trenches, this is not a game where you have warm-ups and foul-outs that really do not matter in the grand scheme of life. Helping people resolve their disputes is not a sport with easily applicable rules. A missed call does not mean losing a trip to the Super Bowl. Instead, a missed call could result in someone never seeing their kids again or losing their home, their freedom, or *everything*. Again, there is always a wider dimension to what we do.

If I were to sum up the core message I hope you take away from this Essay, it would be this: There is a difference between our legal legitimacy and our public relevancy, and we in the courts are not spending enough time deeply worrying about the latter in the face of the significant social changes around us. When I made a similar comment to a group of judges some time ago, one judge retorted that he was not worried about innovation or relevance because the Constitution made the courts relevant merely by establishing them. I am not so sure about that. In fact, his comment perfectly demonstrates my underlying concern. We are now participants in a competitive industry. If we are not careful—if we are unwilling to rethink our business model, the services we offer, our modes of delivery; if we cannot adjust to changing public expectations—the public justice system will see declining

19. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Presented at the annual convention of the American Bar Association (1906).

relevance as more attractive competitors become available. The fact that people, through constitutions, establish courts does not guarantee that courts are relevant. Relevance is earned. It is not gratuitously given.

Why is rethinking systems so difficult? I recommend for your reading a 1999 article in the Harvard Business Review entitled “Why Good Companies Go Bad.”²⁰ When considering why seemingly successful companies ultimately failed, Dr. Donald Sull found four common themes that collectively he called “active inertia.” They were:

1. First, assumptions framed by past success blinded leaders to identifying innovations and making the hard decisions needed to meet evolving needs and future challenges.
2. Second, processes and procedures became routines, so much so that maintaining the status quo was simply easier than dislodging it to adapt.
3. Third, existing relationships and ways of relating shackled the ability of leaders to think about new forms of relationships and new ways of relating.
4. And fourth, values became unyielding dogmas. I would argue that many of the values of justice have now become enshrined as procedural dogmas.²¹

Perhaps Dr. Sull’s most consequential conclusion relevant for the leaders of any institution is relatively simple to understand but hard to counter. He found that leaders of good companies became trapped by long-engrained institutional thinking. It was not that they outright ignored the signs of the times or misunderstood the changing environment. Firestone Tire, for example, was well-aware that a French company called Michelin had developed a tire called the “radial” and introduced it to the European and U.S. markets. The tire took hold, but still the leaders of Firestone failed to adjust.²² Their thinking about relationships, practices, and values was so anchored in certain assumptions and beliefs that they could only make changes at the fringes when, in fact, the threats drove to the very core of their business model. They were convinced that in making small changes they were doing something radically different. They were engaged in Dr. Sull’s active inertia.

Given the enormous challenges we face, I suggest that it is time for those of us working in the public justice system to engage in a systemic exercise in “zero-based” leadership. We should ask ourselves this “zero-based” question: Knowing what we know today, would we have designed the justice system that we have? Stated differently, are the delivery mechanisms, institutions, processes, and procedures that have been developed and served us for the last two-hundred years up to the demands of the highly connected, self-service-oriented society that is the Twenty-First Century? If the answer is “no” or even “probably not,” then it is time

20. Donald Sull, *Why Good Companies Go Bad*, HARV. BUS. REV. (July–Aug. 1999).

21. *Id.*

22. *Id.*

to rethink the system by focusing on changes that will promote greater access and produce more meaningful and sustainable outcomes to disputes while also protecting core values.

III. SOLUTIONS

Having outlined some challenges we face, the most pressing of which are the limitations we impose on our own thinking, let me offer three ideas as springboards for actually “rethinking” the delivery of justice services in an increasingly self-service society.

First, should we fundamentally redesign the way people access and interact with the justice system, and particularly the civil justice system? For good or ill, people expect to be able to interact at their convenience and through means that are often disconnected from the principle of physicality. I am not suggesting this is always good, only that it is the increasing reality in which we operate in our personal lives. Yet, we in the courts tend to be somewhat traditional in our thinking, willing to make changes on the peripheries but not all that willing to ask questions that get to the core. I recently asked a group of judges whether they thought people should be required to physically come to the courthouse and potentially wait for hours for a case to be called even if the matter would surely be disposed of in fifteen minutes. As you can imagine, there were wide opinions on this issue. What surprised me about the responses I received was the number of judges who believed that coming to court, regardless of the underlying issue, was just part of the process; going to court was not intended to be convenient. It was intended, seemingly, to be quite the opposite. The theme across almost all answers was, to my disappointment, “That’s just the way it is.”

Just consider, for a moment, the notions of venue and jurisdiction that form the heart of our system and many of its rules. These concepts, or aspects of them, were generally defined in an era where horses, buggies, and model-T’s defined boundaries and distance. In many states, particularly in the East and Midwest, courthouses were located within a day’s horseback ride. Venue was intended to define a place that encompassed the notion of community participation in the administration of justice and prevent one party from subverting access to local courts, e.g., forum shopping, to inconvenience the other party or find a legally more favorable location. Thus, venue became a question of physical location and geography and, frankly, imaginary lines on a map. But what happens when some of the lines no longer make sense? In tacit recognition of this reality and the need for change, we haltingly institute new electronic systems, write rules for electronic filing, and give the public online access to dockets, and think we have achieved something revolutionary. We have not. The system remains very much grounded in past business practices and notions of geography and physicality, all while most of us are increasingly living our lives in a virtual world unconstrained by such considerations.

This world of virtual relationships is hugely reshaping how we interact with systems today and also how we expect to interact with systems in the future. Why should I go to court in a physical sense when I can conduct almost every other aspect of my life in a virtual sense? I cannot remember the last time I walked into a bank. I can now consult a physician online and receive a prescription for most common illnesses without ever leaving my home. Should we not consider that going to court

in the future is no longer about *place*, but about opportunities for a variety of dispute resolution services offered in a variety of ways? Even our more recent effort, Online Dispute Resolution (“ODR”), is defined as an “alternative” to going to court in the physical sense. One article I read suggested that ODR is nothing more than another attempt at promoting “alternative” dispute resolution by placing it on the internet. It was not described as an opportunity for courts to offer a broader array of services or a new way of engaging the public and resolving disputes.

For many types of cases, ODR could become the preferred access to the system, not its alternative. I am not suggesting that going to court should be like shopping on Amazon. The issues are not that simple, not that prototypical. Resolving human conflict can be an exceedingly complex exercise given the potential for highly opposing financial, emotional, and factual perspectives on a conflict. I am suggesting, however, that in a world of increasing expectations for self-service and cynical attitudes towards institutions, we need to address public expectations in a way that builds trust and confidence and secures the vitality of the public justice system. We cannot remain bunkered down in physical locations expecting “them to come to us” because the “them” have increasing opportunities to go somewhere else to resolve their disputes without ever leaving their homes or jeopardizing their jobs.

Second, should we consider whether the complexity of our system—its intense procedural rules and complex institutional design—is meeting the needs of our citizens? Behind my desk, when I was the Administrative Director of the Ohio Supreme Court, were four volumes of court rules. These four volumes side-to-side were almost a foot wide. I do not dispute the need for rules. What I question is whether all these rules actually serve the purpose of establishing justice—whether they have become ends in and of themselves. In all my years, I cannot remember a time when a commission on rules of practice and procedure recommended *reducing* the number of rules. The rules have been designed for lawyers, not the public, and that is a problem in an era when people expect to do some of the work themselves. In fact, the rules, at times, seemed designed to discourage and distance the public from active participation in court processes. The question is not, therefore, whether we need procedural rules to protect the integrity of processes, but whether we should develop rules that achieve that end by better balancing integrity with new demands for access. Rules should be flexible and more targeted in their design and, depending on the case type, simple enough for the public to understand and use.

Finally, and perhaps most importantly, should we reconsider what it means to go to court in the future? Years ago, the late Professor Frank E.A. Sander proposed the idea of the “comprehensive justice center,” which came to be known as the “multi-door” courthouse, designed to offer a variety of dispute resolution services.²³ Rather than the judiciary performing the role of umpiring a competitive game, he envisioned a public center where people had access to a range of diversified services based on litigant needs and not uniformity of process. He called upon the courts to de-routinize the system; to think of new ways of relating; to replace unyielding procedures with more nimble approaches designed to meet particularized objectives; to rethink what the courthouse means with all the historical narrative, connotation, and belief we attach to that term.

23. Frank E. A. Sander, *The Multi-Door Courthouse: Settling Dispute in the Year 2000*, 3 BARRISTER 18 (1976).

Unfortunately, the forty-plus years spent on instituting this concept has been a hit and miss venture at best. We continue to debate both the appropriateness and efficacy of courts providing “alternative” dispute resolution services as a core function of the judicial system.²⁴ While some courts embrace “alternative” dispute resolution programs, few courts see them as an essential or integral part of their operations, their responsibilities, and their services; they remain, as the label suggests, “alternatives.” Professor Sander’s notion of the comprehensive justice center where there are no “alternative” processes but, rather, a continuum of processes remains an elusive goal. The “presumption” in both procedure and approach remains anchored in the belief that every case filed with a court will eventually need a full-blown trial even though most cases, especially civil cases, will settle far short of that requirement.

Some of the “miss” in our “hit and miss” approach is our own culturally-constrained thinking that still sees the courtroom battle as the idyllic forum, the prototype for resolving disputes. Some of the “miss” is that we have allowed the courts to become a bludgeon of sorts used by parties and their attorneys to force negotiated settlements, often on the “courthouse steps.” As a result, adversarial litigation still forms much of our collective belief in how the dispute resolution system should operate. The changes we have made, the “hits,” while not to be glibly diminished, have been more at the edges and too often cast as alternatives to that other more “superior” process. All the while, the public continues to express concern about the long-term damaging effects of this adversarial-first, alternatives-second focus. No one ever casts adversarial litigation as the alternative to other forms of dispute resolution.

If we are going to truly focus on public service and not institutional preservation, we need to invest in differentiated systems of access to justice and differentiated systems of dispute resolution, not simply differentiated systems of case management. Through the principle of immediate triage at intake, people in an emergency room are directed to those services likely to be most helpful. Similarly, we should implement deep systemic changes designed to identify key contested issues early, leading to a targeted approach for resolving those issues using a variety of techniques along the continuum of dispute resolution tools including, at times, alternatives to full adversarial litigation. Not everyone who walks into a hospital is presumed to need a neurosurgeon or a cardiac surgeon, and hospital procedures are not designed to direct that result. The same principle should apply to our dispute resolution systems.

IV. FINAL THOUGHTS

I am under no illusion that transforming our thinking on this topic is easy. Courts are tradition-bound institutions, and there is good that comes with that fact so long as the traditions are in pursuit of a larger objective: establishing justice and protecting core values. But traditions and traditional thinking can also be dangerous. We miss cues, dismiss contrary information, and ignore the effects of

24. See, e.g., Jeffery W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledging Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 291 (1996) (discussing multiple perspectives on the incorporation of other forms of dispute resolution within the judicial process).

external forces on internal dynamics. If we are not careful, we can “tradition” ourselves into irrelevancy, constitutional words notwithstanding.

So, I ask again: Knowing what we know today, would we design the system of justice that we have? That is the central question facing us now given the enormous shifts that are occurring in our society where there is greater focus on self-service, exponentially increasing opportunities for virtual interaction, and expanding competition from others to provide dispute resolution services.²⁵ I suspect for many of us the answer is “probably not,” given what is happening around us and our own admitted expectations for how we interact with systems and the services they provide. I suspect many in the public would answer “no.” That is not a bad thing because it gives us a starting point, an opportunity to ask more penetrating questions about how we protect our core values while innovating to ease access into the system and the diversity of services that it can offer. It gives us the opportunity to design a system of justice for the Twenty-First Century where virtual ways of relating are balanced against the real challenges and complexities of human disputes. But if we do not do this, if we do not ask penetrating questions, we may all celebrate our legitimacy while losing our relevancy. Together, through innovative contributions, we can ensure that the American justice system retains its vitality and its status as the envy of the world.

25. Tania Sourdin, *The Role of the Courts in the New Justice System*, 7 Y.B. ON ARB. & MEDIATION 95 (2015) (arguing that the multi-door courthouse concept with the judiciary at the epicenter of the dispute resolution process is being replaced by the “multi-option justice system” because there are now many opportunities outside the formal courts for people to attempt to resolve their disputes).